

ENTERED

F 2302

San Francisco Law Library

436 CITY HALL


No. *1615.74.*

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

2974

No. 15130

United States
Court of Appeals
for the Ninth Circuit

FEDERAL DEPOSIT INSURANCE COR-
PORATION, as Receiver of the Bank of North
Idaho, Substituted for the Bank of North
Idaho,

Appellant,

vs.

MERLE C. MYHRE and BETTY A. MYHRE,
Husband and Wife,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho,
Northern Division.

FILED

No. 15130

United States
Court of Appeals
for the Ninth Circuit

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of the Bank of North Idaho, Substituted for the Bank of North Idaho,

Appellant,

vs.

MERLE C. MYHRE and BETTY A. MYHRE,
Husband and Wife,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho,
Northern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of.....	1
Certificate of Clerk	40
Designation of Points and Record	42
Statement of the Case	3
Answer	33
Complaint	13
Exceptions to Proposed Findings and Judgment	36
Findings of Fact and Conclusions of Law	7
Judgment	4
Memorandum Opinion Dated Jan. 11, 1956	34
Memorandum Opinion Dated Mar. 16, 1956	37
Notice of Appeal	38
Stipulation	31

NAMES AND ADDRESSES OF ATTORNEYS

ROYAL L. COBURN,
General Counsel;

JOHN L. CECIL,
Assistant General Counsel,
Washington, D. C.;

GRAYDON W. SMITH,
Attorney General for Idaho,
Boise, Idaho;

McNAUGHTON & SANDERSON,
Coeur d'Alene, Idaho,
Attorneys for Appellant.

WHITLA & KNUDSON,
E. T. KNUDSON,
Box 231,
Coeur d'Alene, Idaho,
Attorneys for Appellees.

In the District Court of the United States, in and
for the District of Idaho, Northern Division
No. 1988

MERLE C. MYHRE and BETTY A. MYHRE,
Husband and Wife,
Plaintiffs,
vs.

FEDERAL DEPOSIT INSURANCE COR-
PORATION, as Receiver for the Bank of
North Idaho, a Corporation,
Defendant.

STATEMENT OF THE CASE

Defendant appeals on questions of law.

A concise statement of the points on which defendant intends to rely on the appeal, is as follows, to wit:

I.

That the United States District Court was without jurisdiction to grant plaintiffs priority, since judicial designation of the order of priority of claims against an insolvent, Idaho state bank, in the hands of defendant receiver for liquidation, lies exclusively with the district court of Idaho of the county where the bank is located, as provided in Section 26-913, Idaho code.

II.

No trust fund or trust in any property in the hands of the defendant receiver, was alleged. In their action, the plaintiffs sought only relief by way of damages for an alleged wrongful conversion of property and made proof accordingly.

The questions presented by this appeal arise by virtue of defendant's objections to the proposed Findings of Fact and Conclusions of Law and Judgment, submitted to the trial court (which proposed Findings and Judgment were later adopted) and the decision of the United States District Court overruling these objections.

The Judgment proposed and later entered in the above-entitled case, from which Judgment this appeal is taken, is as follows, to wit:

“In the United States District Court for the
District of Idaho, Northern Division
No. 1988

MERLE C. MYHRE and BETTY A. MYHRE,
Husband and Wife,

Plaintiffs,

vs.

FEDERAL DEPOSIT INSURANCE COR-
PORATION, as Receiver for the Bank of
North Idaho, Substituted for the Bank of
North Idaho, a Corporation,

Defendant.

JUDGMENT

This action having come regularly on for trial before Honorable Chase A. Clark, presiding judge, sitting without a jury, the plaintiffs appearing in person and with their attorney, E. T. Knudson, of the firm of Whitla & Knudson, and the defendant appearing by its attorneys of record, W. F. Mc-

Naughton and H. S. Sanderson, and the Court after hearing and considering the evidence introduced on behalf of the respective parties has made and entered herein Findings of Fact and Conclusions of Law, which are hereby specifically referred to and made a part of this Judgment, in which said Findings of Fact and Conclusions of Law it is ordered that a Judgment be entered herein in favor of the plaintiffs and against the Defendant;

Now, Therefore, in accordance with the law and premises and said Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed, that the plaintiffs, Merle C. Myhre and Betty A. Myhre, husband and wife, do have and recover of and from the defendant, Federal Deposit Insurance Corporation, as receiver for the Bank of North Idaho, a corporation, the sum of \$5,184.46, together with interest thereon at the rate of 6% per annum from May 1, 1954, to the date hereof in the amount of \$544.32, making a total judgment of \$5,728.78.

It Is Further Ordered, Adjudged and Decreed, that the defendant shall within 20 days from the date hereof tender and deliver to the plaintiffs at Rathdrum, Idaho, the following-described articles which have been identified by the plaintiffs as belonging to them, to wit:

Miscellaneous Items:

1—1 set of baby pictures.

2—1 carved wooden plaque of gun in holster.

- 3—1 Italian rapier.
- 4—2 oil paintings without frames, McKenzie.
- 5—1 rake.
- 6—1 shovel.
- 7—1 leaf rake.
- 8—1 picture album.
- 9—2 framed pictures of family.
- 10—1 framed picture, Christ, tinted.
- 11—1 pair spurs.
- 12—1 box Christmas cards.
- 13—1 cigarette container with 2 trays.

Clothing:

- 1—1 blue cap, lady's.
- 2—1 green, shorts. (Jantzen.)
- 3—1 white, cotton shorts.
- 4—1 red shorts. (Whit Stag.)

It Is Further Ordered, Adjudged and Decreed, that the money judgment hereby awarded is entitled to the priority as a trust fund in the order of payment of the debts of the original defendant, Bank of North Idaho, a corporation, and that the defendant as receiver shall allow this Judgment such priority.

It Is Further Ordered, Adjudged and Decreed, that the plaintiffs recover their costs and disbursements herein incurred, taxed in the sum of \$185.56.

Dated this 16th day of March, A.D. 1956.

CHASE A. CLARK,
District Judge."

The Findings of Fact and Conclusions of Law proposed and later adopted, are as follows, to wit:

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

“This cause having come regularly on for trial before Honorable Chase A. Clark, presiding Judge, the plaintiffs appearing in person and with their attorney, E. T. Knudson, of the firm of Whitla & Knudson, and the defendant appearing by its attorneys, W. F. McNaughton and H. S. Sanderson, whereupon oral and documentary evidence was introduced on behalf of the respective parties, following which briefs were regularly submitted by the respective parties, and the Court, after hearing and considering the evidence introduced and the records and files in this action, the Court makes the following:

Findings of Fact

I.

That the plaintiffs, Merle C. Myhre and Betty A. Myhre, are husband and wife, and are residents of Spokane County, State of Washington.

That the original defendant, Bank of North Idaho, was at the commencement of this action, a corporation organized and existing under and by virtue of the laws of the State of Idaho and engaged in the banking business with its principal place of business at Priest River, Bonner County,

State of Idaho. That thereafter and pursuant to motion regularly made and order entered the Federal Deposit Insurance Corporation, as receiver for the Bank of North Idaho, was regularly substituted as defendant herein.

II.

That on November 10, 1953, these plaintiffs obtained from the defendant, Bank of North Idaho, a loan in the principal sum of \$1,500.00 and to evidence said loan these plaintiffs executed a promissory note bearing date the 10th day of November, 1953, in the principal sum of \$1,540.00 due March 10, 1954, which said principal sum included interest at 8% per annum to the due date. For the purpose of securing the payment of the foregoing mentioned note the plaintiffs executed a chattel mortgage upon certain personal property.

III.

That after default had occurred in connection with some of the installments payable according to the terms of said note these plaintiffs, in pursuance of an understanding and an agreement entered into between the plaintiffs and the defendant bank, through their respective attorneys, executed to the defendant a bill of sale to a quantity of personal property, belonging to the plaintiffs, which at that time was stored at Bekins Moving & Storage Company at Spokane, Washington.

The terms and conditions of the agreement under which the plaintiffs executed and delivered to the defendant the bill of sale referred to were:

That the defendant would promptly release to the plaintiffs all articles of a personal nature which were among the stored property referred to in the bill of sale, and that the defendant would promptly notify the plaintiffs when and where they could call for the items to be released to them.

That upon receipt of the bill of sale by the defendant, the defendant would promptly proceed to sell for the best prices obtainable such of the personal property retained by it as would be necessary to pay all sums owing to it, including the principal and interest evidenced by the note hereinbefore referred to, also all storage and transfer expenses and selling costs together with an attorney fee of \$150.00 and to return to the plaintiffs any property not sold or any excess proceeds from such sale.

IV.

That pursuant to the terms of such agreement, and in reliance thereon, the plaintiffs turned over to the defendant the property described in the schedule attached to plaintiffs' complaint marked "Exhibit A," which said property was turned over and delivered to the defendant on the 17th day of March, 1954, and the Court finds that said property, at the time of the delivery of same to the defendant, was of the fair value of \$8,000.00.

V.

That the defendant violated the terms of its agreement with the plaintiffs in that it failed to

return to the plaintiffs the articles of personal—it failed to sell the property for the best price obtainable and it failed to give the plaintiffs any report or accounting concerning the property, and the Court finds that the defendant converted said property and that such conversion by the defendant occurred as of the first day of May, 1954.

VI.

The Court further finds that the defendant has certain property in its custody which should and can be returned to the plaintiffs which property is of the value of \$739.00, the property referred to as returnable being the following:

Miscellaneous Items:

- 1—1 set of baby pictures.
- 2—1 carved wooden plaque of gun in holster.
- 3—1 Italian rapier.
- 4—2 oil paintings without frames, McKenzie.
- 5—1 rake.
- 6—1 shovel.
- 7—1 leaf rake.
- 8—1 picture album.
- 9—2 framed pictures of family.
- 10—1 framed picture, Christ, tinted.
- 11—1 pair spurs.
- 12—1 box Christmas cards.
- 13—1 cigarette container with 2 trays.

Clothing:

- 1—1 blue cap, lady's.

2—1 green, shorts. (Jantzen.)

3—1 white, cotton shorts.

4—1 red shorts. (Whit Stag.)

VII.

The Court finds that the plaintiffs are entitled to a judgment herein in the amount of \$8,000.00 (being the fair value of the property converted) less the following:

- | | | |
|-----|---|------------|
| (1) | The amount of the Original note. | \$1,540.00 |
| (2) | Interest on \$1,500.00 (the amount of the original loan) from March 10, 1954, to May 1, 1954..... | 17.00 |
| (3) | The value of the property to be returned by the defendants as hereinbefore mentioned | 739.00 |
| (4) | Storage and transfer costs..... | 369.54 |
| (5) | Attorney's fees which were agreed to between the parties involved prior to the time the property was delivered to the defendant | 150.00 |

leaving a total judgment in favor of the plaintiffs and against the defendant in the amount of \$5,184.46 together with interest thereon at the rate of 6% per annum from May 1, 1954, to the date hereof.

The Court further finds that the defendant upon taking possession of plaintiffs' property involved

in this action became a trustee of such property and by reason for such status and the conversion of such property by the defendant, the judgment granted herein is entitled to a priority as a trust fund.

From the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

I.

That this Court has acquired due jurisdiction of the parties to and the subject matter of this action.

II.

That this action has come regularly on for trial and that this Court has jurisdiction to enter judgment herein.

III.

That the plaintiffs are entitled to a judgment herein against the Federal Deposit Insurance Corporation, as receiver for the Bank of North Idaho, a corporation (the original defendant), in the amount of \$5,184.46, together with interest thereon at the rate of 6% per annum from May 1, 1954, to the date hereof and that said judgment will carry with it a priority as a trust fund.

That as a part of said judgment the defendant shall be required to forthwith deliver to the plaintiffs the property itemized and listed in Paragraph VI of the foregoing Findings of Fact.

It Is Ordered, that a judgment be entered herein accordingly.

Dated this 16th day of March, A.D. 1956.

CHASE A. CLARK,
District Judge.”

Originally, this action was against the Bank of North Idaho.

Subsequent to the filing of said action, at the request of R. U. Spaulding, Commissioner of Finance of the State of Idaho, the Federal Deposit Insurance Corporation, pursuant to Section 26-1403, Idaho code, was duly appointed, and became, receiver and liquidator of the Bank of North Idaho, on the 30th day of April, 1955. Upon motion, an order was entered in these proceedings on the 14th day of July, 1955, substituting said receiver as party defendant, in place and in stead of the Bank of North Idaho.

[Title of District Court and Cause.]

COMPLAINT

Comes now the above-named plaintiffs and for cause of action against the above-named defendant complain and allege:

I.

That the plaintiffs, Merle C. Myhre and Betty A. Myhre, are husband and wife and are residents of Spokane County, State of Washington.

That the defendant, Bank of North Idaho, is a corporation organized and existing under and by virtue of the laws of the State of Idaho, and engaged in the banking business with its principal place of business at Priest River, Bonner County, State of Idaho.

II.

That the jurisdiction of this Court exists and is founded upon diversity of citizenship and a jurisdiction amount in excess of \$3,000.00, exclusive of costs and interest.

III.

That heretofore and on November 10, 1953, these plaintiffs obtained from the defendant, at its principal place of business, Priest River, Idaho, a loan in the principal sum of \$1,540.00 and to evidence said loan these plaintiffs executed a promissory note bearing date the 10th day of November, 1953, in the principal sum of \$1,540.00 under the terms of which promissory note the said principal sum was to be paid in four equal installments of \$385.00 each, the first payment due December 10, 1953, and monthly installments thereafter until paid in full. Interest at the rate of eight (8%) per cent per annum to be paid at the time of and in addition to the installments upon the principal.

IV.

For the purpose of securing the payment of the foregoing-mentioned promissory note these plaintiffs, at said time and place, agreed to execute, in favor of the defendant, a chattel mortgage upon

certain personal property, a list of which personal property was at that time and place prepared in the handwriting of the plaintiff, Merle C. Myhre, and turned over to the defendant, through its president and managing officer, James C. Morley, with the request and understanding that said list of personal property would be copied and incorporated in the chattel mortgage. That pursuant to such agreement the plaintiffs executed a chattel mortgage form which did not at that time contain a description of the property, however, it was understood and agreed by and between the plaintiffs and the said James C. Morley, acting for the defendant corporation, that the list of personal property prepared by the plaintiff, Merle C. Myhre, as hereinbefore alleged, would be copied and inserted in the chattel mortgage and that they, the plaintiffs, would be furnished a true copy of the chattel mortgage within a very few days after said date of November 10, 1953. That the property which the plaintiffs listed to be included in said chattel mortgage and which was included in said chattel mortgage was of the reasonable value of in excess of \$3,800.00.

V.

That thereafter the defendant through its said officer caused to be inserted in said chattel mortgage so executed by these plaintiffs, the list of personal property which was prepared and delivered to the defendant by the plaintiffs as hereinbefore alleged and in addition to the articles of property so listed by the plaintiff, the defendant,

through its said agent, incorporated and included in said chattel mortgage the following articles of personal property, to wit:

1 Cooler Ace Co.

1 Propane Restaurant Size Range, Wolf.

1 Heating System, Propane, 11 units.

1 Cash Register.

1 Ami Juke Box.

1 14-ft. Norseman Boat.

That said articles were included and described in said chattel mortgage without the knowledge, consent or authority of these plaintiffs and in violation of the agreement theretofore had between the plaintiffs and defendant concerning the security which was to be given in connection with the loan hereinbefore mentioned.

VI.

That notwithstanding the defendant's agreement to furnish the plaintiffs with a true and correct copy of the chattel mortgage, as hereinbefore alleged, the defendant failed, neglected and refused to furnish the plaintiffs with such copy and as a result thereof these plaintiffs did not learn what had been included and incorporated in the chattel mortgage until plaintiffs' attorney procured a certified copy of said chattel mortgage from the office of the County Recorder, Bonner County, Idaho, on April 7, 1954. That immediately upon learning that the foregoing-mentioned articles had been included in the description contained in said

chattel mortgage these plaintiffs promptly protested to the defendant but the defendant refused to recognize their protest.

That after said chattel mortgage had been executed and on or about February 2, 1954, these plaintiffs, in pursuance of an understanding and an agreement entered into between the plaintiffs and the defendant through their respective attorneys, under the terms of which agreement the plaintiffs agreed to execute to the defendant a bill of sale to a quantity of personal property, belonging to the plaintiffs, which at that time was in storage at Bekins Moving and Storage Co. in Spokane, Washington, which stored property included the property covered by the said chattel mortgage.

That the terms and conditions of the agreement under which the plaintiffs executed and delivered to the defendant the bill of sale hereinbefore referred to were as follows:

That the defendant would promptly release to the plaintiffs all articles of a personal nature which was among the stored property referred to in the bill of sale.

The defendant to promptly notify the plaintiffs when and where they could call for the items to be released to them.

Upon receipt of the bill of sale by the defendant, the defendant agreed to promptly proceed to sell for the best prices obtainable, the personal property retained by it, and out of

the proceeds of the sale, the defendant was to deduct all sums owing to it, including the principal and interest evidenced by the note and mortgage hereinbefore referred to including expenses of storage, transfer and selling cost together with an attorney fee of \$150.00 and to turn over to the plaintiffs any surplus proceeds remaining from the sale.

VIII.

That pursuant to the terms of said agreement the plaintiffs turned over to the defendant the property described in the schedule attached hereto marked "Exhibit A" and made a part hereof, which said property was turned over and delivered to the said defendant on or about the 17th day of March, 1954. That said property was at the time of said delivery to the said defendant of the reasonable and fair value of in excess of \$10,000.00, and being of the value of \$8,000.00 in excess of the amount which the plaintiffs owed the defendant.

IX.

The defendant took possession of the said property at the time and in the manner hereinbefore alleged and has never given to the plaintiff any notice as to when or where any sale of any of the property would be held or conducted. Not having received any notice as concerns any sale or any notice or information as to when or where the plaintiffs could receive the personal items which were to be returned to them, the plaintiffs, through

their attorney and under date of April 10, 1954, mailed to Mr. Samuel Morley, president of the defendant bank, a written demand for an accounting of all items taken and a demand for the return of all items which were to be returned to the plaintiffs. No reply or response was received from the defendant and thereafter the plaintiffs, on June 14, 1954, caused to be mailed to the defendant another written notice of demand in words and figures as follows, to wit:

Notice

To: Bank of North Idaho; Priest River, Idaho.

Not having received any report whatever concerning the disposition of the personal property which was turned over to you by us under a bill of sale sent you early in February last in connection with our settlement with you of the amount payable under our chattel mortgage;

And not having received notice of the time and place we may receive from you our clothing and personal items which were to be returned to us, in accordance with arrangements made by our respective attorneys;

We, the undersigned, respectfully demand that within ten (10) days of the date hereof you furnish us an accounting of the sale of the property concerning which said bill of sale was given you by us early in February last;

And also, we hereby respectfully demand that you do, within ten (10) days of the date hereof,

notify us as to where and when we may receive the clothing and personal items above referred to.

Dated this 11th day of June, A.D. 1954.

/s/ MERLE C. MYHRE,

/s/ BETTY MYHRE.

X.

Thereafter, and in response to the last above-mentioned demand, and on or about the date of June 16, 1954, the plaintiffs, through their attorney, received from the defendant a letter advising the plaintiffs as follows:

“Please advise your clients that they may pick up their personal effects at the Rathdrum State Bank on June 21/54 at 10:30.

“While the details of the aforesaid sale of the chattel are not necessarily any of their concern we state that they were sold for \$1,000.00.”

That thereafter and pursuant to the direction contained in said letter, the plaintiffs called at the Rathdrum State Bank on June 21, 1954, at the time specified, but the writer of the said letter, James C. Morley, was not at said bank at the stated time and no one at the said bank could or would give the plaintiffs any information as to where their property could be found or secured. That the defendant has not turned over or tendered to the plaintiffs the personal property they were entitled to receive back from the defendant. The defendant

has never given to the plaintiffs any statement or report of the above sale of the property except said statement hereinbefore set forth.

XI.

That the defendant has violated the terms of its agreement with the plaintiffs in the following respects:

That the defendant has failed, neglected and refused to return to the plaintiffs the articles of personalty which it agreed to return to the plaintiffs.

That the defendant has failed, neglected and refused to sell the property, which was turned over to it for sale, for the best prices obtainable.

That the defendant has failed, neglected and refused to give the plaintiffs any report or accounting concerning what has been done with the property or where it is located.

Plaintiffs' therefore allege that the defendant by its action has converted said property to its own use in violation of the agreement entered into as hereinbefore alleged and by reason thereof the defendant has caused the plaintiffs to suffer damage and loss to the extent of \$8,000.00.

Wherefore, plaintiffs pray judgment as follows:

(1) That the defendant be required to forthwith account to the plaintiffs concerning what disposition, if any, has been made regarding the property

delivered to it pursuant to the agreement hereinbefore alleged.

(2) That the Court determine the fair value of the property turned over to the defendant by the plaintiffs and that the plaintiffs be awarded a judgment against the defendant in the mount of \$8,000.00, said amount being the fair value of the property turned over to the defendant by the plaintiffs, less the amount found payable to the defendant under the promissory note and chattel mortgage hereinbefore referred to and less the storage, transfer, cost, and attorney's fees in the amount of \$150.00.

(3) That the plaintiffs recover their costs and disbursements herein incurred.

WHITLA & KNUDSON,

By E. T. KNUDSON,

Attorneys for Plaintiffs, Residing at Coeur d'Alene,
Idaho.

Duly verified in Aug., 1954.

“EXHIBIT A”

(Attached to Plaintiff's Complaint)

Kitchen and Dishware:

1. (3) Cast iron frying pans—small, medium and large (black).
2. (1) Revere coffee pot—8 cup.

3. (3) Stainless steel mixing bowls.
4. (1) Large aluminum roaster.
5. (1) Double boiler—Pyrex.
6. (1) Double boiler—Revere.
7. (3) Assorted size pans—Revere.
8. (1) 2-qt. Hotpoint pressure cooker.
9. (1) Magnetic wall type can opener.
10. (1) 1 set German knives (Messerfralik), includes meat cleaver, bread, paring, cake, etc.
11. (1) Setting for 8, sterling silver, in mahogany case. (Estmoreland.)
12. (1) Setting for 8, Franciscan pottery—celery dish, covered dish, 2 extra serving dishes, 2 platters.
13. (1) Tea set for six, Bavarian china.
14. (1) Silver chased whiskey decanter W/6 matching glasses and tray (antique).
15. (1) Set of 6 engraved copper mugs.
16. (1) Sunbeam hand mixer with twin bowls (electric).
17. (1) Westlox kitchen clock (electric).
18. (6) Assorted copper and ceramic type planters.
19. (1) Midget white ivory Packard Bell kitchen radio.

Living Room, Den and Dining Room Furnishings and Decorations:

1. (1) China mantelpiece clock (electric).
2. (1) Cuckoo clock (broken).

3. (1) Seth Thomas 22" 8-day clock with blond oak case with raised Roman numerals.
4. (1) 10" barometer cased in teakwood carved in design of anchor (antique).
5. (2) Chinese vases 12" high with carved green and gold dragons (antiques).
6. (2) Oil paintings without frames, painted by Mrs. Myhre's grandmother, Mrs. E. A. McKenzie (keepsakes).
7. (4) Chinese 8" x 20" prints with feather outlay depicting pagodas, tigers, mountains, etc., with simulated teakwood frames.
8. (1) HH and carved wooden plaque of gun in holster (antique and keepsake).
9. (1) Italian rapier of 17th century, Latin-inscribed blade (antique).
10. (1) Maine Gauche hand dagger, Italian, 17th Century, with family crest on guard (antique).
11. (1) Spanish casque or helmet, 16th Century sword, dent on side, with name, Juan de Pina, on front (antique).
12. (1) 1865 Navy Colt revolver with elkhorn grips with engraved barrel and cylinders, initials D. P. B. on butt (rare).
13. (3) Pair book ends—bronze baby shoes, bronze deer and copper horses.
14. (1) 12" world globe on brass base, shaped as eagle claw (antique).

15. (1) Ronson table lighter (decanter).
16. (4) Hilton pocket lighters.
17. (1) Underwood portable typewriter with gray case, initials B. A. M.
18. (1) Black onyx Shaeffer pen set with ink decanter.
19. (1) Ivory desk set with scissors, letter opener and ruler, in brown leather case.
20. (1) Cherry wood candy bowl.
21. (1) Black ebony cigarette box (antique).
22. (2) Cigarette containers with ash trays to match.
23. (1) Set bagpipes (McKenzie plaid).
24. (1) Engraved quillons wrapped in oil cloth (antique).

Personal Clothing:

1. (4) Ladies sweaters, size 36; colors pink, blue, tan and green—2 Jantzens and 2 cashmeres, bought in Canada.
2. (3) Pair ladies shorts, size 12—outdoor—colors red, white and green. 2 White Stag and 1 Jantzen, also an old pair of white.
3. (2) Ladies bathing suits, size 34, Jantzens.
4. (3) Young girls' bathing suits, sizes 6 and 8—1 green, gross and pink.
5. (2) Pair lady's shoes, size 6½ AAA, bought in St. Paul, originals.
6. (4) Beach towels, assorted colors.

7. (6) Pair lady's gloves—size $6\frac{1}{2}$ —3 leather and 3 cloth.
8. (1) Box lady's costume jewelry, mostly summer.
9. (4) Ladies' nightgowns—1 purple, 1 blue and white, 1 black, 1 pink.
10. (1) Pair men's swimming trunks with Hawaiian print, size 32.
11. (6) Men's sports shirts—3 Arrow, long sleeve, size $15\frac{1}{2}$; 3 Van Huesen, short sleeve.
12. (2) Pair men's summer weight slacks, Botany brand gabardine; 1 tan, 1 green; size 32 by 34 length.
13. (2) Pair men's sports shoes—I rubber-soled, size $8\frac{1}{2}$, and 1 leather, Bostonian brand.
14. (1) Alligator brand, size 42, long British model trench coat with zip out plaid lining—initials MCM inside.
15. (5) Ladies' handbags — 2 handbags leather, 1 corday, 1 dark brown leather and 1 silver evening bag.
16. Misc. ribbons, hankies, scarfs, belts, and etc.

Personal and Private Papers:

1. (3) Three sets baby pictures with frames, 1 with 8 tinted, age 6 months, 1 black and white, age 1 year, and 1 larger picture, tinted, six years old (Mrs. Myhre's daughter).

2. (1) "Solomon Christ," tinted, with frame.
3. (1) Black and white Kent & Arlene Myhre (Christmas present).
4. Various pictures of both families.
5. Accounts, cancelled checks, personal letters, letters of recommendation, service record, discharge record, insurance policies, business records, school mementos, inventories, receipts, survey plots and sketches, keepsakes, travel folders, tickets, etc.

Bedroom, Bath and Accessories:

1. (1) Ladies' ivory dresser set of brush, comb, mirror with matching tray and fingernail set.
2. (1) Ceramic doll with purple dress—handmade.
3. (1) Ladies' set dressing table, decanters for lotions, powder, etc. (4-pc. set cut glass).
4. (6) Down pillows.
5. (1) Sewing kit of bamboo, complete with pinking shears, needles, thread, etc.
6. (9) Blankets (approx.), 2 Hudson Bays, 1 pink, 1 blue green, 1 blue flower, 1 red, 1 green flower and 1 red flower, also 1 Orr health blanket.
7. (1) G. E. electric blanket (green), with twin dials.
8. (1) Crosley bedroom clock radio, in ivory and green, with broken volume control.

triever and pheasants on breech. (In tan cowhide carrying case with copper brush bore cleaner and solvent, Hoppe's No. 9 kit; 1 No. 357 Magnum Smith and Wesson revolver with mottled frangite grips, in tan cowhide, U. S. Air Corps shoulder holster—has 4-inch barrel and small chip out of right grip.

11. (1) Bausch and Lomb 8 x 50 binoculars, with night lens, in grey heavy color, with brown carrying case, with combat infantryman badge on flap.
12. (2) Pair spurs—1 blunt army-type and one pair silver mounted Mexican vaquero type, with 3" rowels (souvenirs).
13. (1) 30 caliber M-1 with sling, Army carbine (new), belonging to Major Harlan Jackson who left it in my care until he returns from Germany.
14. (1) Double Alaskan down sleeping bag, with waterproof cover and hood.
15. (1) Complete set of Rudyard Kipling, bound in leather—10 volumes.
16. (1) Set of Robert W. Service, 6 volumes, bound in vellum.
17. (2) Dozen or more of the last ten years' best sellers—authors, A. J. Cronin, Ernest Hemingway, Shellebarger, etc.
18. (1) Zeiss Contaflex 35 MM. camera, with F 2/8 lens and flash attachments, in

leather and canvas carry-all, with complete instructions and two books on camera technique.

Furniture:

1. (1) Chrome kitchen set, including four upholstered chairs.
2. (1) Dining room set, including four upholstered chairs and buffet.
3. (1) T-piece sectional davenport.
4. (1) Occasional chair (green).
5. (1) T.V. tweed chair (green).
6. (2) Teakwood end tables.
7. (2) Teakwood lamps.
8. (1) Corner table (blond).
9. (1) Black metal three-way lamp (grey shade).
10. (1) Three-way floor lamp (green shade).
11. (1) Three-piece blond mahogany bedroom set.
12. (1) Three-piece grey walnut bedroom set.
13. (1) Four-piece maple bedroom set (wagon wheel design).
14. (3) Beauty Rest mattresses and springs.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated, that on Tuesday, January 24, 1956, we, the undersigned attorneys of record in the above-entitled action, went to the Rathdrum State Bank at Rathdrum, Idaho, and in com-

pany with the plaintiffs in this action examined such of the articles as were there which are listed in Exhibit "A," attached to the defendant's Answer in this action, for the purpose of determining which of the items so listed in said exhibit could be identified as belonging to the plaintiffs which could be returned to the plaintiffs and the following items are the only ones, described in said exhibit, which were identified by the plaintiffs as being part of the property involved in this action, to wit:

Miscellaneous Items:

- 1—1 set of baby pictures.
- 2—1 carved wooden plaque of gun in holster.
- 3—1 Italian rapier.
- 4—2 oil paintings without frames, McKenzie.
- 5—1 rake.
- 6—1 shovel.
- 7—1 leaf rake.
- 8—1 picture album.
- 9—2 framed pictures of family.
- 10—1 framed picture, Christ, tinted.
- 11—1 pair spurs.
- 12—1 box Christmas cards.
- 13—1 cigarette container with 2 trays.

Clothing:

- 1—1 blue cap, lady's.
- 2—1 green, shorts (Jantzen).
- 3—1 white, cotton shorts.
- 4—1 red shorts (White Stag).

At said time and place other articles were examined by plaintiffs, but the foregoing are the only ones which were identified by the plaintiffs as having belonged to them which are involved in this action.

Dated this 26th day of January, A.D. 1956.

E. T. KNUDSON,
Attorney for Plaintiff.

H. S. SANDERSON,
Attorney for Defendant.

ANSWER
(Abbreviated)

The Answer alleges the bill of sale was in settlement of the indebtedness except as to certain property which was to be returned to the plaintiffs, which at all times since has been subject to their call.

Denies generally other allegations of the complaint, and alleges a much lower value of the property.

Evidence

The plaintiffs at the trial offered proof of all the allegations of their complaint and of the alleged value of each item contained in "Exhibit A" attached to their complaint.

The defendant offered its proof on values and proof supporting the allegations of the answer and its denials.

At the conclusion of the trial the Court took the matter under advisement and briefs of the respective parties were submitted and thereafter the Court found for the plaintiffs.

Thereafter, and on January 11, 1956, the Court rendered and served upon counsel the following memorandum, to wit:

[Title of District Court and Cause.]

MEMORANDUM

Clark, Chief District Judge.

This case was tried before the Court, sitting without a jury. Briefs have been submitted and the Court has fully considered the same.

This action is brought by the plaintiffs for an alleged conversion of their property by the defendant bank. The plaintiffs seek the return of the property or judgment of \$8,000, which is the alleged fair value of the property, less amounts plaintiffs owed at the time of the alleged conversion on a promissory note which they executed to defendant bank, and less storage and transfer cost of the property, and an attorney fee which the plaintiffs agreed to pay.

The Court is of the opinion that under the evidence and the law, the plaintiffs have shown a conversion by the defendant as of the 1st day of May, 1954. From the evidence it appears that the bank has certain property in its custody which should and can be returned to the plaintiffs herein and

the Court is of the opinion that the value of this property is \$1,181.50. The original note in the amount of \$1,540.00, dated November 10, 1953, and due March 10, 1954, included interest at 8% to the due date.

The Court fixes the fair value of the property converted at \$8,000. The plaintiffs are entitled to judgment in that amount, less the following:

- | | | |
|-----|--|------------|
| (1) | The value of the property to be returned by the bank as set forth above | \$1,181.50 |
| (2) | Interest on \$1,500 (the amount of the original loan) from March 10, 1954, to May 1, 1954..... | 17.00 |
| (3) | Storage and transfer costs..... | 369.54 |
| (4) | Attorney's fees as shown by the exhibits and testimony to have been agreed upon by the parties involved, in the amount of..... | 150.00 |

or a total judgment with priority in favor of the plaintiffs for \$4,741.86, together with interest at 6% from May 1, 1954, to date.

January 11, 1956.

That thereafter, the attorneys for plaintiffs proposed Findings of Fact and Conclusions of Law which were finally entered as above set forth herein.

Before the entry of said Findings of Fact and Conclusions of Law, the defendant's attorneys served upon plaintiffs' attorneys, and filed with the court its objections thereto as follows:

[Title of District Court and Cause.]

EXCEPTIONS TO PROPOSED
FINDINGS AND JUDGMENT

Comes now the defendant in the above-entitled action and excepts to the proposed Findings of Fact and Conclusions of Law as follows:

To the last paragraph of the proposed Seventh Finding of Fact, wherein the Court is asked to find that the defendant became a trustee of the property alleged in the complaint to have been converted, and that the judgment is entitled to a priority as a trust fund. This exception is on the ground

First: That it is not responsive to issues raised by the pleadings;

Second: That the matter of priority is subject to determination as provided by I.C. 26-913;

And, also, except to the proposed provision in the Decree providing:

“It Is Further Ordered, Adjudged and Decreed that the money judgment hereby ordered is entitled to the priority as a trust fund in the order of payment of the debts of the original defendant, Bank of North Idaho, a corporation, and the defendant as receiver shall allow this judgment such priority,” as also being contrary to said Sections 26-913 and 26-915, I.C.

Dated this 2nd day of February, 1956.

W. F. McNAUGHTON,
Attorney for Defendant.

Thereafter, and on the 16th day of March, 1956, a second memorandum was entered by the judge and served upon counsel as follows:

[Title of District Court and Cause.]

MEMORANDUM

Clark, C. J.

Plaintiffs herein have submitted proposed Findings of Fact, Conclusions of Law and Judgment as directed by the Court, and thereafter objections were filed thereto by defendant's counsel, in which objection was made to the finding that this recovery by the plaintiffs was entitled to priority as a trust fund and to the Judgment in accordance therewith.

In view of the objections made the Court has further considered the matter. Where the mortgagee obtains and is in possession of goods, as shown by the record herein, it is the Court's opinion that the mortgagee acts as trustee for the mortgagor. It appears to this Court, therefore, that this judgment is entitled to priority as a trust fund in accordance with the Idaho statutes. The objections will be overruled and the proposed Findings of Fact, Conclusions of Law and Judgment will be signed and filed as of this date.

Dated March 16, 1956, at Boise, Idaho.

[Title of District Court and Cause.]

NOTICE OF APPEAL

“Notice Is Hereby Given, that the Federal Deposit Insurance Corporation, as receiver of the Bank of North Idaho, substituted for the Bank of North Idaho, a corporation, above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Judgment entered in this action on the 16th day of March, 1956.

Dated this 12th day of April, 1956.

ROYAL L. COBURN,
General Counsel;

JOHN L. CECIL,
Assistant General Counsel;

GRAYDON W. SMITH,
Attorney General for Idaho;

McNAUGHTON & SANDER-
SON,

/s/ W. F. McNAUGHTON,
Attorneys for Appellant.

Filed: April 14, 1956.

The defendant, being an agency of the United States, no bond on appeal is required.

It Is Hereby Stipulated, between the parties, by their respective attorneys, that pursuant to Rule 76, the foregoing Statement of the Case contains all matters necessary to a decision by the Appellate Court of questions raised on the appeal and may be certified as the record on the appeal taken from the Judgment to the United States Court of Appeals for the Ninth Circuit.

Dated this 4th day of May, 1956.

WHITLA & KNUDSON,

/s/ E. T. KNUDSON,

Attorneys for Plaintiffs and
Appellees.

ROYAL L. COBURN,

General Counsel;

JOHN L. CECIL,

Assistant General Counsel;

GRAYDON W. SMITH,

Attorney General for Idaho;

McNAUGHTON & SANDER-
SON,

/s/ W. F. McNAUGHTON,

Attorneys for Defendant and
Appellant.

The foregoing Statement of the Case is approved as sufficient to fully present questions raised by the appeal, and may be certified as such by the Clerk

of this Court, to the United States Court of Appeals for the Ninth Circuit.

Dated this 1st day of May, 1956.

/s/ CHASE A. CLARK,

Judge of the U. S. District
Court.

[Endorsed]: Filed May 1, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify the foregoing Statement as the appeal, under Rule 76 (FRCP), in this case.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 15th day of May, 1956.

[Seal]

ED M. BRYAN,
Clerk;

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 15130. United States Court of Appeals for the Ninth Circuit. Federal Deposit Insurance Corporation, as Receiver of the Bank of North Idaho, Substituted for the Bank of North Idaho, Appellant, vs. Merle C. Myhre and Betty A. Myhre, Husband and Wife, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed May 17, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for
the Ninth Circuit
No. 15130

FEDERAL DEPOSIT INSURANCE COR-
PORATION, as Receiver of the Bank of North
Idaho, Substituted for the Bank of North
Idaho, a Corporation,

Appellant,

vs.

MERLE C. MYHRE and BETTY A. MYHRE,
Husband and Wife,

Appellees.

DESIGNATION OF POINTS AND RECORD

Pursuant to Rule 17 (6) of the United States
Court of Appeals for the Ninth Circuit, Appellant
states the points upon which it intends to rely, are:

1. The District Court erred in its Findings of
Fact as follows:

“The Court further finds that the defendant,
upon taking possession of plaintiff’s property
involved in this action, became a trustee of
such property and by reason for such status
and the conversion of such property by the
defendant, the judgment granted herein is en-
titled to a priority as a trust fund.”

over Appellant’s objections on the grounds that the
Court acted:

(a) Beyond its jurisdiction, and

(b) The Findings of Fact are not within
the actions tendered by the Complaint.

2. The District Court erred in incorporating in its decree the following:

“It Is Further Ordered, Adjudged and Decreed that the money judgment hereby awarded is entitled to the priority as a trust fund in the order of payment of the debts of the original defendant, Bank of North Idaho, a corporation, and that the defendant as receiver shall allow the judgment such priority.”

over the objections of appellant, on the following grounds:

- (a) Beyond the court's jurisdiction, and
- (b) Not within the actions tendered by the complaint.

3. The action at bar is in personam for damages and does not seek to establish a trust.

With the foregoing statement of points, the appellant hereby designates the Statement of the Case, stipulated and filed on the 1st day of May, 1956, in the District Court, pursuant to Rule 76, Federal Rules of Civil Procedure, and approved by the District Court as sufficient record on appeal.

Dated this 22nd day of May, 1956.

McNAUGHTON & SANDER-
SON,

/s/ W. F. McNAUGHTON,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 25, 1956.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for the Bank of North Idaho, Inc.,
substituted for the BANK OF NORTH IDAHO,
INC., a Corporation, *Appellant,*

vs.

MERLE C. MYHRE AND BETTY A. MYHRE,
husband and wife, *Appellees.*

*Upon Appeal from the District Court of
the United States for the District
of Idaho, Northern Division*

BRIEF OF APPELLANT

ROYAL L. COBURN, General Counsel,
Federal Deposit Insurance
Corporation, Washington, D. C.
JOHN L. CECIL, Assistant General
Counsel, Federal Deposit Insur-
ance Corp., Washington, D. C.
GRAYDON W. SMITH, Boise, Idaho.
McNAUGHTON & SANDERSON,
W. F. McNAUGHTON
Coeur d'Alene, Idaho.
Attorneys for Appellant.

SUBJECT INDEX

	Page
Jurisdictional Statement-----	2
Statement of the Case-----	3
Specifications of Error-----	6
Argument -----	8
Conclusion -----	18

TABLE OF CASES

	Page
Bellevue State Bank v. Coffin	
22 Ida. 210, 125 P. 816-----	10
Bybee v. D. W. Standrod & Co.	
44 Ida. 708, 260 P. 157-----	15
Cook County National Bank v. United States	
107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537-----	16
Cox v. St. Anthony Bank & Trust Co.	
41 Ida. 776, 242 P. 785-----	10
Lloyd v. Diefendorf	
54 Ida. 607, 34 P. (2d) 53-----	15
National Bank of the Republic v. Porter	
44 Ida. 514, 258 P. 544-----	10
U. S. Nat'l. Bank of Portland v. D. W. Standrod & Co. 42 Ida. 711, 248 P. 16-----	10
Uyeda v. Diefendorf	
54 Ida. 614, 34 P. (2d) 65-----	10

STATUTES

	Page
Title 28 U. S. C., Sec. 1291-----	2
Title 28 U. S. C., Sec. 1332-----	2
Idaho Code, Sec. 26-908-----	19
Idaho Code, Sec. 26-913-----	22
Idaho Code, Sec. 26-915-----	23
Idaho Code, Sec. 26-1403-----	20
Idaho Code, Sec. 26-1407-----	21

No. 15130

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for the Bank of North Idaho, Inc.,
substituted for the BANK OF NORTH IDAHO,
INC., a Corporation, *Appellant,*

vs.

MERLE C. MYHRE AND BETTY A. MYHRE,
husband and wife, *Appellees.*

*Upon Appeal from the District Court of
the United States for the District
of Idaho, Northern Division*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court of the United States for the District of Idaho, Northern Division, was invoked pursuant to the provisions of Title 28, United States Code, Section 1332. The Appellees were citizens of the State of Washington, and the Appellant was a citizen of the State of Idaho, viz., a banking corporation organized and existing under the laws of the State of Idaho (R. 7). The amount in controversy exceeded the sum of \$3,000, exclusive of interest and costs.

The jurisdiction of this Court to review this case arises under Title 28, United States Code, Sections 1291 and 1294, this being an appeal from a final decision of a District Court of the United States from which an appeal may be taken to this Court (R. 4).

STATEMENT OF THE CASE

This action was instituted in the District Court of the United States by the Appellees, residents of the State of Washington, against the Bank of North Idaho, Inc., an Idaho banking corporation, seeking to recover damages for the alleged wrongful conversion of personal property. While the action was still pending there, but before trial, the bank, having become insolvent, was taken over by the Commissioner of Finance of the State of Idaho and the Appellant, Federal Deposit Insurance Corporation, was appointed its receiver, pursuant to the provisions of Section 26-1403 of the Idaho Code (Appendix 20). Upon showing duly made, Federal Deposit Insurance Corporation, as such receiver, was substituted as party defendant (R. 13). The suit arose out of the following circumstances.

The Bank of North Idaho, Inc., located in Priest River, Idaho, loaned Appellees Fifteen Hundred Dollars, evidenced by their promissory note, dated November 10, 1954, which note was secured by a chattel mortgage (R. 8). Upon default in the terms of the note Appellees executed a bill of sale in favor of the bank conveying to it the property covered by the mortgage, with certain exceptions, under an agreement which provided that the property would be sold by the bank at the best price obtainable; that the bank would retain such sums as might be necessary

to pay Appellees' indebtedness and return to them any property not sold or any excess proceeds from the sale (R. 9). The property was delivered to the bank pursuant to the terms of the agreement and was sold by it. However, no excess proceeds were turned over to Appellees, nor was any of the property returned to them in kind (R. 10).

The case was heard before the court, who found in favor of Appellees, assessing damages in the sum of \$5,184.46, together with interest thereon at the rate of 6% per annum from May 1, 1954 to date of judgment, making a total judgment of \$5,728.78 (R. 5), which was entered against the receiver.

Over Appellant's objection, the court designated the amount of its above judgment as a trust fund and directed the receiver to give it priority in payment as such a trust fund (R. 6) under Section 26-915, Idaho Code (Appendix 23).

The questions involved are:

1. The judgment is not entitled to a priority as a trust fund since it is neither responsive to the issues raised by the pleadings nor supported by the evidence offered by Appellees.
2. The court was without authority or jurisdiction to direct the receiver to give the judgment

statutory priority as a trust fund under Section 26-915, Idaho Code.

The questions arise by reason of the proposed findings of fact and conclusions of law submitted to the court by Appellees (R. 7), the objections thereto by Appellant, and the overruling of said objections by the court (R. 37).

SPECIFICATIONS OF ERROR

I.

The action at bar is in personam. It was not one seeking to impress a trust upon specific property or a specific fund or to trace trust property into assets in the hands of the receiver of the Bank of North Idaho, Inc., a closed banking institution.

II.

The court erred in making the following findings:

“The Court further finds that the Defendant upon taking possession of the Plaintiff’s property involved in this action became a trustee of such property and by reason for (sic) such status and the conversion of such property by the Defendant, the judgment granted herein is entitled to a priority as a trust fund” (R. 11).

over Appellant’s objections (R. 36) that (a) the court in making such finding acted beyond its jurisdiction or authority, and (b) the finding is not within the issues raised by the pleadings.

The court erred in incorporating the following in its decree:

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the money judgment here-

by awarded is entitled to the priority as a trust fund in the order of payment of the debts of the original Defendant, Bank of North Idaho, a Corporation, and that the Defendant as Receiver shall allow this judgment such priority'' (R. 6)

over Appellant's objections (R. 36) that (a) the court in entering such decree acted beyond its jurisdiction or authority, and (b) such decree is not within the issues raised by the pleadings.

ARGUMENT

I.

NO FUNDS OR PROPERTY OF THE APPELLEES WERE TRACED INTO THE HANDS OF THE RECEIVER AND THEREFORE THE JUDGMENT ENTERED IN THIS CAUSE IS NOT ENTITLED TO PRIORITY IN PAYMENT AS A TRUST FUND.

An examination of the complaint filed in the action (R. 13-33) discloses that substantially the following allegations are made therein:

Appellees borrowed Fifteen Hundred Dollars from the Bank of North Idaho, Inc.; to secure that indebtedness Appellees gave a chattel mortgage to the bank, which, however, failed to adequately describe the mortgaged property; because of this defect Appellees later gave the bank a bill of sale to the property (with certain exceptions, not important here) accompanied by a written agreement which provided, inter alia, that the bank was to sell the property at the best price obtainable, deduct all sums owing to it and turn over the excess to them; the property delivered to the bank thereunder had a value of \$8,000 in excess of the amount owed by Appellees; a formal notice was served on the bank request-

ing a report of the disposition of the property and an accounting of the sale; in response thereto the bank advised Appellees that, while the details of the sale of the property were not necessarily of their concern, the chattels were sold for \$1,000.

On these allegations Appellees sought, as the gravamen of their complaint, money damages in the amount of \$8,000 by reason of the alleged wrongful conversion of the property.

It can thus be seen that nowhere in the complaint were any allegations made touching in any respect on the question of trust funds or the tracing of trust funds into the hands of the receiver, nor was any such relief sought. Even conceding that the evidence established the above allegations, a reading of the findings of fact (R. 7-12) will disclose that no findings were made from the evidence offered by Appellees to justify the court's decreeing that "the Defendant as Receiver shall allow this judgment such priority." (R. 6).

It is the well-settled majority doctrine that in order to entitle a claimant to a preference or priority in payment with respect to the assets of a bank in the hands of a receiver, it must be shown that the assets in the receiver's hands have been augmented or benefited by the trust fund. (7 *Am. Jur. Banks*, Sec. 788)

This doctrine has been adopted and consistently followed by the Idaho courts. (*Bellevue State Bank v. Coffin*, 22 Ida. 210, 125 P. 816; *Cox v. St. Anthony Bank & Trust Co.*, 41 Ida. 776, 242 P. 785; *U. S. Nat'l. Bank of Portland v. Standrod & Co.*, 42 Ida. 711, 248 P. 16; *National Bank of the Republic v. Porter*, 44 Ida. 514, 258 P. 544; *Uyeda v. Diefendorf*, 54 Ida. 614, 34 P. (2d) (65.)

In the Porter case the Supreme Court of Idaho stated the rule as follows:

"In construing this act of the Legislature, *1 this court has laid down the rule that, in order to impose a trust upon the property of a defunct bank in the hands of its receiver, where the rights of others are involved, the person seeking to establish the trust must trace the fund, or the property into which it has been converted, into the hands of the receiver. And where the fund has been so commingled with the property of the defunct bank as to render its tracing or identification impossible, he must show that the fund, in some tangible way, augmented, or bettered, the estate coming into the possession of the receiver, before he can impress a trust upon any portion of said estate * * *."

"The burden of tracing the trust fund into the hands of respondent was on the cestui que trust, appellant, 39 Cyc. 532; *Lusk D. & I. Co. v. Gintner*, 32 Wyo. 294, 232 P. 518. If, by reason of its having been commingled with the assets of the bank, the fund could not be traced, the burden

*Idaho Code, Section 26-915 (Appendix 23).

was still on appellant to show that fund had augmented or increased the assets of the Citizens' State Bank, of Buhl, coming into respondent's possession."

In the *Cor* case the court stated:

"That plaintiff was a trust creditor does not, of itself, entitle him to preference over general creditors. To obtain that right, he must show, by presumption of law or otherwise, that his fund has been preserved in the hands of the assignee, as an increase of the assets of the estate, from which it may be taken without impairment of the rights of general creditors."

In the case at bar there was a total failure on the part of the Appellees to bring themselves within the provisions of the above stated principle. Having wholly failed to allege or prove the identity or the amount of any property of the Appellees which came into the hands of the receiver or to trace into or identify in the hands of the bank's receiver the proceeds of any trust fund or in any way show the augmentation of assets in the receiver's hands, it is submitted on this state of the record that there was nothing presented to the trial court to entitle Appellees to a judgment in the action granting them the priority in payment of a trust fund out of the receivership estate.

II.

THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, IN ENTERING A JUDGMENT AGAINST THE RECEIVER OF AN IDAHO BANKING CORPORATION, WAS WITHOUT JURISDICTION OR AUTHORITY TO ASSIGN SUCH JUDGMENT A STATUTORY PRIORITY AS A TRUST FUND.

The trial court in its findings of fact (R. 11) found that

“the Defendant upon taking possession of Plaintiffs’ property involved in this action became a trustee of such property and by reason for (sic) such status and conversion of such property by the Defendant, the judgment granted herein is entitled to a priority as a trust fund.”

and determined in its judgment (R. 6).

“that the Defendant as receiver shall allow this Judgment such priority.”

Section 26-908 of the Idaho Code (Appendix 19) deals with the powers of the commissioner of finance on closing a state bank. It provides in substance that the commissioner is authorized to collect all monies due to such bank and to do such other acts as are necessary to conserve its assets and business, and that

he shall proceed to liquidate its affairs. He has general and exclusive power and authority to do any and all acts, to take any and all steps necessary or, in his discretion, desirable for the protection of the property and assets of the bank and the payment of its creditors.

Section 26-1403 of the Idaho Code (Appendix 20) authorizes the Federal Deposit Insurance Corporation to act as receiver of an Idaho banking institution and grants to it, as such receiver, all the rights, powers and privileges provided by the Idaho laws with respect to the commissioner of finance acting as receiver or liquidator of a banking institution.

Section 26-915 of the Idaho Code (Appendix 23) fixes the order of payment of the debts of a bank liquidated by the commissioner as follows: 1) expenses of liquidation; 2) all funds held by the bank in trust; 3) debts due depositors; 4) contractual liabilities; 5) interest on all foregoing classes of claims; and 6) unliquidated claims for damages and the like.

Section 26-913 of the Idaho Code (Appendix 22) deals with the allowance and rejection of claims and provides that *the commissioner* shall reject or allow all claims in whole or in part, and on each claim allowed *shall designate the order of its priority*. If a claim is rejected or an order of priority allowed

lower than that claimed, notice of his action shall be given to the claimant. The action of the commissioner shall be final unless an action be brought by the claimant against the bank in the proper court of the county where the bank is located within ninety days after notice of rejection of the claim or the fixing of its priority, or an appeal from the commissioner's allowance, either as to priority or amount, may be taken to the district court of the county in which the bank is located within thirty days after the allowance; and the court or judge shall hear proof of the parties and enter judgment reversing, affirming or modifying the commissioner's action.

That the present action may be maintained in the federal court is not here called into question, but it is respectfully submitted that in such an action the judgment rendered in the federal court proceeding merely determines the legal existence of *the amount of the claim* against the receivership. Even if it were to be conceded that the court properly found, under an adequately pleaded and proved case, that the amount due the Appellees by virtue of the judgment here under consideration constituted a trust fund, it is asserted that that court is without authority to classify the statutory order of priority of the claim. By virtue of the Idaho statute last above referred to, this power is vested exclusively in the commissioner of finance (here Appellant as his designee), whose

decision is final, subject only to review by the district court of the county wherein the bank is located and in the manner set forth in the statute.

In *Bybee v. D. W. Standrod & Co.*, 44 Ida. 708, 260 P. 157, which was a suit to recover deposits alleged to have been accepted by a bank while insolvent, the Supreme Court of Idaho stated, in reference to the liquidation of a bank in the hands of the commissioner:

“The controlling question in this case is whether or not Chap. 42, Sess. Laws 1921, provides an exclusive method of recovery by a claimant against an insolvent bank in the hands of the bank commissioner. * * * * The purpose of Laws 1921, c. 42, is to sequester the assets of an insolvent bank and place them for purposes of liquidation in the hands of the commissioner of finance to be by him administered for the benefit of all claimants, *such method of liquidation to be exclusive.*” (Emphasis supplied)

In *Lloyd v. Diefendorf*, 54 Ida. 607, 34 P. (2d) 53, the court considered specifically Section 25-915 of the Idaho Code (Appendix 23), and in that case stated:

“And the controlling question here, is, Does our Bank Act, *supra*, provide an exclusive method of recovery by a claimant against an insolvent bank in the hands of the commissioner of finance? It is clear to our minds that the Bank Act, *supra*, was intended to, and does, constitute a complete system for the organization, regulation, and

liquidation of state banks, covering the entire field, and every phase and ramification thereof * * * and is exclusive.”

The *Lloyd* case quotes from the United States Supreme Court in *Cook County National Bank v. U. S.*, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537, in which case the court considered the provisions of the National Bank Act and compared that Act with the Idaho Bank Act which contains similar provisions. Part of that quotation is as follows:

“We consider that Act as constituting by itself a complete system for the establishment and government of national banks prescribing the manner in which they may be formed * * * their liability to be placed in the hands of a receiver, and the manner in such event in which their affairs shall be wound up * * * or their property applied toward such payment. Everything essential to the formation of the banks * * * the winding up of the institutions and the distribution of their effects are fully provided for as in a separate code by itself.”

It can thus be seen that the sole authority to designate the order of priority of claims against an insolvent state banking institution of the State of Idaho is vested in the Commissioner of Finance, and therefore the District Court of the United States, in granting the subject judgment a priority as a trust fund, and directing the receiver to allow it as such a claim against the receivership, usurped the right exclusively granted by statute to the Commissioner (here to Ap-

pellant as his designee), and therefore acted without authority. The classification of such a claim is subject to judicial action, in the event an order of priority is allowed lower than that claimed, only in the district court of the county wherein the bank is located, and in either of two ways, i.e., (1) an appeal to that court by the aggrieved party from the commissioner's classification or (2) a plenary action brought against him in that court. For this reason, it is submitted that that portion of the judgment of the District Court of the United States granting the subject judgment a statutory priority and directing the receiver to allow it such priority is ineffective and unenforceable.

CONCLUSION

It is asserted that for the reasons herein stated the trial court (a) was in error in decreeing that the judgment herein entered should be granted a priority as a trust fund and directing the payment thereof by the receiver out of funds of the receivership estate and (b) was without authority to grant the judgment a priority as a trust fund under the provisions of Section 26-915 of the Idaho Code. It is therefore submitted that in accordance with the foregoing this honorable court should modify the judgment of the District Court of the United States for the District of Idaho entered in favor of the Appellees and against the Appellant by eliminating therefrom the provision (R. 6) that the judgment is entitled to the priority as a trust fund in the order of payment of the debts of the original defendant, Bank of North Idaho, Inc., and the provision that the Appellant, as receiver, shall allow it such priority.

Respectfully submitted,

ROYAL L. COBURN, General Counsel,
Federal Deposit Insurance
Corporation, Washington, D. C.

JOHN L. CECIL, Assistant General
Counsel, Federal Deposit Insur-
ance Corp., Washington, D. C.

GRAYDON W. SMITH, Boise, Idaho.

McNAUGHTON & SANDERSON,

W. F. McNAUGHTON

Coeur d'Alene, Idaho.

W. J. McNaughton

Attorneys for Appellant.

A P P E N D I X

APPLICABLE PROVISIONS OF
IDAHO BANK ACT

Idaho Code Section 26-908. Powers of Commissioner on Closing Bank. "Upon taking the assets and business of any bank into his possession, the commissioner is authorized to collect all moneys due to such bank, and to do such other acts as are necessary to conserve its assets and business, and he shall proceed to liquidate the affairs thereof. He shall have general and inclusive power and authority, except as otherwise limited by the terms of this act, to do any and all acts, to take any and all steps necessary, or, in his discretion, desirable for the protection of the property and assets of such bank and the speedy and economical liquidation of the assets and affairs of such bank and the payment of its creditors, or for the reopening and resumption of business by said bank, where that is practicable or desirable. He may institute, in his own name as commissioner, or in the name of the bank, such suits and actions and other legal proceedings as he deems expedient for such purposes, and by making application to the district court of the county in which such bank is located, or to the judge thereof, in chambers, may procure an order to sell, compromise or compound any bad or doubtful debt or claim, and to sell and dispose of any or all the assets, which sale may be made to stockholders, officers, directors, or

others interested in such bank, on consent of the court. On such court proceedings the bank shall be made a party by notice issued on order of the court or judge, in lieu of summons, but served in like manner, and the hearing of any such application or petition by the commissioner may be had at any time, either in term or vacation in court, or in chambers, as the court may order, after said bank has had five days' notice of such application."

Idaho Code Section 26-1403. F. D. I. C.—Right to Act as Receiver or Liquidator. "The Federal Deposit Insurance Corporation created by section eight of the Federal 'Banking Act of 1933' (Section 12B of the Federal Reserve Act, as amended) [U. S. C. (4 F. C. A.) tit 12, §264] is hereby authorized and empowered to be and act without bond as receiver or liquidator of any banking institution, the deposits in which are to any extent insured by said corporation, and which shall have been closed on account of inability to meet the demands of its depositors, in lieu of the commissioner of finance, but only if and when requested so to do by said commissioner."

"The commissioner of finance may, in his discretion, in the event of such closing tender to said corporation the appointment as receiver or liquidator of such banking institution, in his stead, and if the corporation accepts said appointment, the corporation shall have and possess all the rights, powers and

privileges provided by the laws of this state with respect to the commissioner of finance acting as receiver or liquidator of a banking institution, and be subject to all the duties of such receiver or liquidator, except insofar as such rights, powers, privileges or duties are in conflict with the provisions of subsection of section 12B of the Federal Reserve Act, as amended (section 8 of said 'Banking Act of 1933')."

"The Corporation shall not, however, without the consent of the commissioner of finance, continue to act as receiver or liquidator of any banking institution after the amount of the insured deposit liability of such banking institution, paid or assumed by the corporation, and the costs of liquidation paid or assumed by it have been repaid it, or after funds are available therefor."

Idaho Code Section 26-1407. Possession and Control of Assets by F. D. I. C. "Upon the acceptance of the appointment of receiver or liquidator aforesaid by said corporation, and during its continuance as such receiver or liquidator, the possession and control of all the assets, business and property of such banking institution of every kind and nature shall pass to and vest in said corporation and without the execution of any instruments of conveyance, assignment, transfer or endorsement, with the same force and effect and to the same extent as in the commissioner of finance under like circumstances."

Idaho Code Section 26-913. Claims—Allowances and Rejection. “The commissioner shall reject or allow all claims in the whole or in part, and on each claim allowed shall designate the order of its priority. If a claim is rejected or an order of priority allowed lower than that claimed, notice shall be given the claimant personally or by registered mail, and an affidavit of the service of such notice, which shall be prima facie evidence thereof, filed in the office of the commissioner. The action of the commissioner shall be final unless an action be brought by the claimant against the bank in the proper court of the county where the bank is located within ninety days after such service to fix the amount of the claim and its order of priority or either. An appeal from the commissioner’s allowance, either as to priority or amount, may also be taken to the district court of such county by any party in interest by serving on the commissioner notice thereof, stating the grounds of objection and filing the same in said court within thirty days after allowance. Within five days after such notice, the commissioner shall file in the court, and serve on the appellant, a copy of the claim and his reasons for allowance. The court or judge shall, after five days’ notice of time and place of hearing on the issues thus made, hear the proof of the parties and enter judgment reversing, affirming or modifying the commissioner’s action.”

Idaho Code Section 26-915. Claims—Order of Payment—Priorities—Offsets. "The order of payment of the debts of a bank liquidated by the commissioner shall be as follows:

1. The expense of liquidation, including compensation of agents, employees and attorneys.

2. All funds held by bank in trust.

3. Debts due depositors, holders of cashier's checks, certified checks, drafts on correspondent banks, including protest fees, paid by them on valid checks or drafts presented after closing of the bank, pro rata. All deposit balances of other banks or trust companies and all deposits of public funds of every kind and character (except those actually placed on special deposit under the statutes providing therefor) including those of the United States, the state of Idaho, and every county, district, municipality, political subdivision or public corporation of this state, whether secured or unsecured, or whether deposited in violation of law or otherwise, are included within the terms of this subdivision and take the same priority as debts due any other depositor; anything in the statutes of the state of Idaho to the contrary notwithstanding. Provided, however, that this section shall not apply to any deposit made by this state or any county thereof, city, town or district of this state prior to the twenty-eighth of February, 1921.

4. All contractual liabilities pro rata.

5. Interest on all foregoing classes of claims without regard to the priority of the principal computed as follows:

Savings accounts at the same rate they bore at the time of the closing of the bank until the next regular date for the computation and crediting of the interest thereon, and thereafter at the rate of seven per cent per annum; time certificates of deposit at the rate fixed in the certificate until the same becomes due by their terms, and thereafter at the rate of seven per cent per annum; all other contractual obligations bearing interest at the rate they bore at the time of closing until due by their terms, and thereafter at seven per cent per annum, and those not bearing interest, at the rate of seven per cent per annum from the time when said bank came into the possession of the commissioner; no interest to be compounded.

6. Unliquidated claims for damages and the like.”

No. 15130

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for the Bank of North Idaho, Inc.,
substituted for the BANK OF NORTH IDAHO,
INC., a corporation,

Appellant,

vs.

MERLE C. MYHRE AND BETTY A. MYHRE,
husband and wife,

Appellees.

*Upon Appeal from the District Court of
the United States for the District
of Idaho, Northern Division*

BRIEF OF APPELLEES

WHITLA & KNUDSON

E. T. KNUDSON

Coeur d'Alene, Idaho.

Attorneys for Appellees.

FILED

AUG 16 1956

No. 15130

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for the Bank of North Idaho, Inc.,
substituted for the BANK OF NORTH IDAHO,
INC., a corporation,

Appellant,

VS.

MERLE C. MYHRE AND BETTY A. MYHRE,
husband and wife,

Appellees.

*Upon Appeal from the District Court of
the United States for the District
of Idaho, Northern Division*

BRIEF OF APPELLEES

SUBJECT INDEX

	Page
Jurisdictional Statement -----	4
Statement of Case -----	5
Argument -----	7
Conclusion -----	17

TABLE OF CASES

	Page
Bybee vs. D. W. Standrod & Co.	
44 Idaho, 708; 260 Pac. 157 -----	11
Commonwealth of Pennsylvania vs. Williams	
72 Fed. 2d 509 -----	14
Corpus Juris, Vol. 65, p. 212 -----	7
Cox vs. St. Anthony Bank & Trust Co.	
41 Idaho 776; 292 Pac. 785 -----	9
Dairy Engineering Corp. vs. DeRae Corporation	
2 Fed. Rules Dec. 378 -----	11
Federal Savings & Loan Ins. Corp.	
vs. Third National Bank	
60 Fed. Supp. 110 -----	12
Gold-Washing & Water Co. vs. Keyes	
96 U. S. 199; 24 Law Ed. 656 -----	12
Ivie vs. W. G. Jenkins & Co., Bankers	
53 Idaho 643; 26 Pac. 2d 794 -----	8
Keiser vs. Walsh	
118 Fed. 2d 13 -----	12
Mechanics & Metals Nat'l. Bank vs. Pingree	
40 Idaho 118; 232 Pac. 5 -----	8
Sacramento Municipal Utility Dist.	
vs. Pacific Gas & Electric Co.	
128 Pac. 2d 529 -----	15

STATUTES

	Page
Title 28 U. S. C., Sec 1291 -----	4
Title 28 U. S. C., Sec 1332 -----	4
Rule 12 of Rules of Civil Procedure -----	12

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court of the United States for the District of Idaho, Northern Division, was invoked pursuant to the provisions of Title 28, United States Code, Section 1332. The appellees were citizens of the State of Washington, and the appellant was a citizen of the State of Idaho, viz., a banking corporation organized and existing under the laws of the State of Idaho. (R. 7) The amount in controversy exceeded the sum of \$3,000.00, exclusive of interest and costs. The pleadings showing jurisdiction in the Federal Court consist of Complaint (R. 13-22) and Answer (R. 33).

The jurisdiction of this Court to review this case arises under Title 28, United States Code, Sections 1291 and 1294, this being an appeal from a final decision of a District Court of the United States from which an appeal may be taken to this Court. (R 4).

STATEMENT OF CASE

Appellees, residents of the State of Washington, commenced this action against the Bank of North Idaho, an Idaho corporation, seeking an accounting and recovery for wrongful conversion of personal property listed at (R. 22 to 31).

Appellees on November 10, 1953, borrowed \$1,500.00 from the said Bank and executed a Promissory Note therefore and also a form of Chattel Mortgage which, at the time of execution did not contain a description of the property to be mortgaged. (R. 15) Later the Bank caused to be inserted in such Chattel Mortgage form a description of property of appellees not intended or agreed upon as security for this debt.

Shortly after default had occurred in re payment under said Note appellees turned over to the Bank a large amount of property, most of which was not covered by said Mortgage, under an agreement whereby the Bank would promptly release to the appellees all articles of a personal nature and further that the Bank would sell, for the best price obtainable, so much of the remainder as was necessary to satisfy appellees' obligation to the Bank and that any surplus from sale and the remainder of the property would be by the Bank returned to appellees.

The Bank took possession of the property on March 17, 1954. Notwithstanding a demand for an accounting and return of the property as per the agreement the

Bank refused to do either and this action was commenced in August of 1954 to compel the Bank to account and to recover the value of the property wrongfully converted by the Bank. (R. 21-22) This action was commenced long before any insolvency of the Bank was heard of.

The appellant was later, upon its own application, substituted as party defendant in the action. The case was tried before Chief District Judge Chase A. Clark who found that the Bank converted appellees' property on May 1, 1954, which was at that time of the fair value of \$8,000.00 which is \$5,923.46 in excess of the amount that appellees were obligated to the Bank for. (R. 11) The Trial Court further found that the defendant Bank, upon taking possession of the appellees' property, under the circumstances, became a trustee of such property and by reason of said status and the conversion of such property by the defendant Bank the judgment should carry with it a priority as a trust fund. Judgment was entered accordingly from which this appeal is taken.

ARGUMENT

I.

In appellant's brief two propositions are argued, the first is stated to be: (p. 8, appellant's brief)

"No funds or property of the appellees were traced into the hands of the receiver and *therefore* the judgment entered in this cause is not entitled to priority in payment as a trust fund."

There is nothing before this Court in the way of a transcript or record of the evidence from which this Court could learn what was shown or proved by the evidence. From the record on appeal how can it be determined by this Court or anyone as to what the evidence proved or failed to prove? Notwithstanding the fact that we sincerely contend that such an argument by appellant is beyond the scope of the record on this appeal we *certainly deny* that the evidence submitted on the part of the appellees *failed* to establish the existence of a trust and that the trustees assets were augmented or benefited by the trust fund. Appellees allege in their complaint all the facts which establish the trust — the appellees turned their property over to the defendant Bank under a special and definite agreement concerning its handling and disposition. The general definition of a trust is stated in 65 C. J. 212, as follow:

"a holding of property, subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived."

In the case of *Mechanics and Metals National Bank vs. Pingree*, 40 Idaho 118 (at page 128) ; 232 Pac. 5, the Supreme Court of Idaho quoted with approval as follow:

“Where property, real or personal, is conveyed by a debtor to his creditor with a power to sell and dispose of it, and apply the property to the payment of the debt, the creditor in executing such power *becomes the trustee* of the debtor, and is bound to act bona fide, and to adopt all reasonable modes of proceeding in order to render the sale most beneficial to the debtor, like any other agent, factor or trustee to sell.”

In the case of *Ivie vs. W. G. Jenkins and Company, Bankers*, 53 Idaho 643; 26 Pac. 2d 794, the Supreme Court of Idaho had under consideration an action for the recovery of a trust fund, — the money was turned over to the Bank for the purpose of purchasing an Australian Bond, and the Court quoted with approval the following:

“In using deposits made for the purpose of having them applied to a particular purpose, the bank acts as the agent of the depositor, and if it should fail to apply it at all, or should misapply it, *it can be recovered as a trust deposit.*”

The Court also discussed the evidence as follows:

“The undisputed evidence shows the money was delivered by appellant to the cashier of the bank, in its place of business, during banking hours, and that, acting for the bank, he received and receipted for it in his official capacity for the specific purpose of buying an Australian bond for appellant. There is no evidence that the money, or any part of it,

ever passed out of the bank. Neither party offered to prove what became of the money after it went into the bank and, so far as the record discloses, there is nothing in the bank's books showing what became of it. Undoubtedly appellant has established, as a fact, that her money was received by the bank and it is immaterial what bookkeeping entry was made with respect to it, or whether any was made. If an entry was made showing the money had been deposited or used in violation of appellant's instructions, it would not change the nature of the transaction."

The Court in that case directed that the fund be regarded as a trust fund and given that priority.

In the case of *Cox vs. St. Anthony Bank and Trust Company*, 41 Idaho 776; 242 Pac. 785, the Court said:

"On the establishment of a trust, the ordinary relation of a debtor and creditor does not exist."

and quoted:

"A true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing but because it his property wrongfully withheld from him."

In the instant case there is no issue on this appeal as to whether or not the evidence was sufficient to establish a trust — the uncontradicted record does show that Judge Clark, the trier of the facts, found that the defendant Bank, upon taking possession of the property involved, took it as trustee for appellants. (R. 12 and 37) In this connection we call attention to the kind and amount of property which was taken by the defendant. (R. 22-31) furniture, (which alone was worth more

than what the appellees owed the Bank) sporting goods, hardware, tools and miscellaneous articles, bedroom and bathroom accessories, kitchen utensils, dishes, living room, den and dining room furnishings and decorations, personal clothing and even personal and private papers including appellee's military service records and his discharge papers, family photos and keepsakes — none of which has ever been paid for or returned.

II.

Referring now to the second point referred to in appellant's brief which contention is that the United States District Court was without jurisdiction to assign the judgment a priority as a trust fund.

It will be remembered that the appellant, under this appeal, concedes that this action may be maintained in the Federal Court, and it is not contended that the amount of the judgment is excessive — it merely contends that the United States District Court should not have granted the priority.

This action was commenced before there was any thought of insolvency as concerns the defendant Bank. The appellant, a federal agency, upon its own application was substituted as the party defendant and voluntarily submitted to the jurisdiction of the Federal Court — no one compelled the appellant to become a party to this action — in fact it voluntarily assumed the duties as liquidator of the defendant bank. It need not have become a party to this action, in fact the Supreme

Court of Idaho, in the case of *Bybee vs. D. W. Standrod and Co.*, 44 Idaho, 708; 260 Pac. 157, has held in substance that the appellant, acting in the capacity it does in this case, cannot in a case of this kind be sued without its consent. However appellant voluntarily submitted, as liquidator of the defendant Bank, to the jurisdiction of the Federal Court for all purposes as concerns this action. It knew that such Court would decide all controversies that existed or may arise between the parties in the case. Under the Federal Rules of Civil Procedure it is the duty of the Court to adjudicate all controversies which exist or may arise in a case. In the case of *Dairy Engineering Corporation vs. DeRaef Corporation*, 2 Federal Rules Decisions 378, the Court said:

“Under the Federal Rules of Civil Procedure, it is the court’s duty to bring in for adjudication all controversies which exist or may arise in the case, so that all questions may be settled, regardless of technical averments.”

Why should not the Trial Court determine all questions that may arise between the parties? The appellant was before the Court as liquidator of the defendant Bank — by defending in the action it was denying that appellees were entitled to any relief whatever. Appellants position was, at the time of the trial, the same as if claim had been made by appellees and denied by appellant and they were before the Court for the purpose of having it determined what relief, if any, the appellees were entitled to.

There is no merit to a contention that the Trial Court should not have granted the priority because it was not specifically prayed for. At the time this action was commenced there was no necessity of priority but when the appellant entered as a party it knew that if the appellees prevailed in their action that the determination of the order of priority would be consistent with the Court's duty to fully adjudicate the controversy between the parties. Under the Federal Rules of Civil Procedure the Court can grant such relief as it finds the parties entitled — irrespective of specific prayer in pleadings.

“We need not consider whether appellant has asked for the proper relief. By Rule 54 (c) of the Federal Rules of Civil Procedure’ * * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.”

Keiser vs. Walsh, 118 Fed. 2d 13.

Nor is there any merit to a contention that appellees are not entitled to the relief granted because the complaint did not specifically allege that a “trust” existed. The complaint in this case fully set forth the facts from which it was expected that the Court would, and did, declare conclusions of law. In the cases of *Gold-Washing and Water Co. vs. Keyes*, 96 U. S. 199; 24 Law. Ed. 656, also in the case of *Federal Savings and Loan Ins. Corp. vs. Third Nat. Bank*, 60 Fed. Supp. 110, it is stated:

“The office of pleading is to state the facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises.”

The appellant knew when it entered this case that the Court would determine all controversies that may arise between the parties relating to the subject of the action and accordingly knew that if appellees prevailed, the Court would, in order to prevent a multiplicity of actions and in keeping with the statutes and rules governing the Federal Courts, decide what classification the recovery would be placed in. Consequently it was the duty of appellant to set up whatever defense or objection it had, if any, either by motion or answer, and its failure to do so constituted a waiver. Sub-paragraph H of Rule 12 of the Rules of Civil Procedure provides:

“A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply. *”

Appellants answer is nothing more than a general denial. (R. 33) If appellant wished or intended to be heard on any question of order of payment, in the event of appellant's recovery, then it was its duty to make such known in the manner as provided by said rule.

As concerns the matter of jurisdiction the appellant concedes (p. 14 of appellant's brief) “that the present action may be maintained in the Federal Court is not here called into question” and it had jurisdiction long before any State Court or officer had anything to do

with any phase of the subject or parties involved. The appellant itself is a Federal Agency. The powers and jurisdiction of the Federal Courts in case of this kind are discussed in the case of *Commonwealth of Pennsylvania vs. Williams*, 72 Fed. 2d 509, as follow:

"While sitting in a state as a court of the United States, the federal court accepts and gives effect to the laws of the state, so far as they do not affect its jurisdiction and the rights of nonresident creditors. Yet it exercises powers independent of the state. A state cannot take away the plenary power of the federal courts given to them by Congress by conferring exclusive jurisdiction of such controversy upon its own courts and administrative bodies, by prescribing exclusive methods of commencing or conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means."

"Whenever citizens of different states lawfully invoke the jurisdiction of the federal courts to determine controversies between them which involve the requisite amounts, they have the constitutional right to the conduct of that litigation by the methods, to the administration of the remedies, and to the determination of those controversies by the independent judgments of those courts; and no state, by conferring exclusive jurisdiction of such issues upon its own courts, by prescribing exclusive methods of commencing or of conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means, may lawfully strike down that right or take away the plenary power of the national courts to conduct the litigation, to administer their remedies, and, in the exercise of their judicial discretion, to control the possession of its subject-matter during its pendency

in accordance with their established rules of practice, *and finally to adjudicate the claims of the parties and to enforce their judgments.*"

The Court further said:

"When federal courts first exercise their jurisdiction, they can maintain it to the end of the litigation, to the exclusion of a state court having concurrent jurisdiction."

In the case of *Sacramento Municipal Utility District vs. Pacific Gas and Electric Co.*, 128 Pac. 2d 529, the Supreme Court of California said:

"It is not questioned that as a general rule the jurisdiction of federal courts over cases within the field of their jurisdiction cannot be enlarged, diminished or impaired by state statutes or regulations; and a person may not be deprived of his right to resort to the federal courts by state legislation."

Certainly no one will argue that the Trial Court in this case did not have the right or jurisdiction to make a finding and to conclude as a matter of law that the defendant Bank held the appellees' property as a trustee and that the money payable to appellees is a "trust fund". This Court is the only authority entitled to review the Trial Court's decision in that respect and since there is no transcript of the evidence before this Court it will undoubtedly be conclusively presumed by this Court that the evidence justified the conclusion reached by the Trial Court. Does the appellant or any State Court now have the right to nullify the Trial Court's conclusion on that point and say that there was no trust involved? Does it take another lawsuit involving the

same identical parties and evidence to determine whether or not a trust was involved and that the judgment in this case is entitled a priority as such?

CONCLUSION

We respectfully submit that a Court of competent jurisdiction has determined that the amount payable to appellees is a fund held in trust — and the Idaho Statute (Section 26-915, Idaho Code) (shown at page 23 of appellant's brief) prescribes the order of payment of such fund. We contend that the appellant is bound by the findings and conclusions of the Trial Court as to the Classification into which this judgment should be placed and it is bound by the Idaho Statute as concerns its order of payment under such classification and consequently the judgment of the Trial Court should be affirmed.

Respectfully submitted,

WHITLA & KNUDSON

E. T. KNUDSON

Coeur d'Alene, Idaho.



Attorneys for Appellees.

No. 15132

United States
Court of Appeals
for the Ninth Circuit

MUENCH-KREUZER CANDLE CO., INC., a
corporation, Appellant,

vs.

LESTER F. WILSON, Appellee.

Transcript of Record

In Two Volumes

Volume I.

(Pages 1 to 326, inclusive)

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

OCT

1956

PAUL P. O'BRIEN, CLERK

No. 15132

United States
Court of Appeals
for the Ninth Circuit

MUENCH-KREUZER CANDLE CO., INC., a
corporation, Appellant,
vs.

LESTER F. WILSON, Appellee.

Transcript of Record

In Two Volumes

Volume I.

(Pages 1 to 326, inclusive)

Appeal from the United States District Court for the Southern
District of California, Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	5
Stipulation Amending	10
Appeal:	
Bond for Costs on	21
Certificate of Clerk to Transcript of Record	
on	25
Designation of Record on (USCA).....	325
Notice of	20
Statement of Points on (USCA).....	320
Supersedeas Undertaking on	23
Bond for Costs on Appeal	21
Certificate of Clerk to Transcript of Record..	25
Complaint	3
Designation of Record on Appeal (USCA)....	325
Findings of Fact, Conclusions of Law and	
Judgment	11
Judgment	19
Names and Addresses of Attorneys.....	1
Notice of Appeal	20

ii.

Statement of Points Defendants-Appellants Intend to Rely on (USCA)	320
Stipulation Amending Answer	10
Supersedeas Undertaking	23
Transcript of Proceedings and Testimony.....	26
Exhibits for Plaintiff:	
1—Patent in Suit No. 2,464,361, L. F. Wilson, March 15, 1949	327
Admitted in Evidence	29
5—License Agreement dated April 18, 1950, Lester F. Wilson and Victrylite Candle Co.	331
Admitted in Evidence	30
6—Orange-Lite, Lester F. Wilson, Victrylite Royalties Beginning April 18, 1950.	335
Admitted in Evidence	62
10—Letter dated April 26, 1950, addressed to Muench-Kreuzer Candle Co. (Copy).....	336
Admitted in Evidence	32
11—Letter dated May 3, 1950 Muench-Kreuzer Candle Co., Inc. to H. Calvin White, Attorney	337
Admitted in Evidence	32
15—Document entitled “Number of Magi-Color Drip Candles Sold”.....	338
Admitted in Evidence	34

Transcript of Proceedings—(Continued)

Exhibits for Defendants:

A—Prior Art Patents	339
1. M. E. Harnisch No. 1,596,017.....	340
2. W. Minrath No. 1,608,518.....	343
3. Philip K. Funke No. 1,701,844.....	346
4. Edwin F. Nelson No. 1,908,044.....	348
5. W. M. Fredericks No. 2,184,666....	350
6. C. Turner No. 2,196,509.....	354
7. Great Britain — Arthur Sterry No. 95	358
8. Great Britain — Arthur Field No. 122	362
9. Great Britain — Jesse Ascough No. 3478	370
10. Great Britain — Wm. C. Smith No. 5902	387
11. German — Dr. O. Hausamann No. 157,209	390
Admitted in Evidence	29
B—Stipulation and Order re Translation of German Patent No. 157,209 to Hausa- mann	393-4
Admitted in Evidence	108

Transcript of Proceedings—(Continued)

Witnesses:

Bechtold, Ira C.

—direct (White)	252, 255
—voir dire (Lyon)	255
—cross (Lyon)	285

Muench, Norbert C. H.

—direct (White)	90, 179
—direct (Lyon)	114
—cross (White).....	147, 158, 190, 210
—redirect (Lyon)	231
—recross (White)	238, 246
—surrebuttal, direct (Lyon).....	300

Wilson, Lester F.

—direct (White)	47, 70
—cross (Lyon)	72
—redirect (White)	81
—rebuttal, direct (White)	296
—cross (Lyon)	298

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LYON & LYON,
CHARLES G. LYON,

811 West Seventh Street,
Los Angeles 17, California

For Appellee:

H. CALVIN WHITE,

611 Wilshire Boulevard,
Los Angeles 17, California

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern District of California, Central Division

Civil Action No. 15273-WM

LESTER F. WILSON, Plaintiff,

vs.

MUENCH-KREUZER CANDLE CO., INC., a corporation, and EMKAY CANDLE CO., INC. a corporation, Defendants.

COMPLAINT FOR INFRINGEMENT OF
LETTERS PATENT

Comes Now the Plaintiff, Lester F. Wilson, and for cause of action against the defendants alleges:

I.

Plaintiff is a citizen of the State of California and resides in San Gabriel, in the County of Los Angeles, State of California.

II.

Defendants, Muench-Kreuzer Candle Co., Inc., and Emkay Candle Co., Inc., according to plaintiff's information and belief, are corporations organized and existing under and by virtue of the laws of the State of New York, and have their principal places of business in the city of Syracuse, State of New York; defendants have [2] a regular and established place of business within the Southern Judicial District of California, Central Div-

ison, at 311 East Commercial Street, Los Angeles, California.

III.

This Court has jurisdiction herein because plaintiff's cause of action arises under the patent laws of the United States.

IV.

On March 15, 1949, United States Letters Patent No. 2,464,361 were duly and legally issued to plaintiff for a certain invention entitled "Drip Candle", and since that date plaintiff has been and still is the owner of the entire right, title and interest in and to said Letters Patent.

V.

Defendants, within the jurisdiction of this Court and elsewhere in the United States, have continuously infringed and are now infringing the aforesaid Letters Patent, by selling and offering for sale within said jurisdiction the product patented in and by said Letters Patent, and by both making and selling said product elsewhere in the United States, and will continue to do so unless enjoined by this Court.

VI.

Plaintiff has placed the required statutory notice on its product manufactured and sold under said Letters Patent.

VII.

Plaintiff has given written notices to defendants of the infringement as aforesaid, and defendants

have wilfully continued the infringement in disregard of such notices.

Wherefore, Plaintiff now petitions this Court for the following relief against defendants:

1. A preliminary and final injunction against further infringement of said Letters Patent by defendants, their agents, [3] employees and all others controlled by defendants;

2. An accounting for profits and the award of treble damages by reason of the wilfulness of the infringement;

3. An assessment of costs and attorney's fees; and

4. Such other and further relief as this Court may determine to be just.

LESTER F. WILSON,
/s/ By WILLIAM P. GREEN,
H. CALVIN WHITE,
WILLIAM P. GREEN,
Attorneys for Plaintiff [4]

[Endorsed]: Filed March 6, 1953.

[Title of District Court and Cause.]

ANSWER

The defendant, Muench-Kreuzer Candle Co., Inc., answering the complaint herein states, that:

1. Defendant is not informed save by the complaint as to the matters set for in Paragraph I

of the complaint and, therefore, denies the allegations therein contained.

2. Defendant admits the allegations contained in Paragraph II of the complaint as to the Muench-Kreuzer Candle Co., Inc., and denies said allegations as to the Emkay Candle Co., Inc.

3. Defendant admits the allegations contained in Paragraph III of the complaint.

4. Defendant is not informed save by the complaint as to the matters set forth in Paragraph IV of the complaint and, therefore, denies the allegations therein contained.

5. Defendant denies each and every allegation contained [5] in Paragraph V of the complaint.

6. Defendant is not informed save by the complaint as to the matters set forth in Paragraph VI of the complaint and, therefore, denies the allegations therein contained.

7. Defendant admits the allegation contained in Paragraph VII of the complaint that plaintiff has given written notice of infringement to defendant, and denies the remaining allegation therein contained.

8. Defendant, upon information and belief, avers that United States Letters Patent No. 2,464,361 are invalid and void because the alleged inventor named therein was not the original and first inventor of the alleged improvement described and claimed therein, but the same, in all of its material and substantial parts, was invented, known and used by others in this country before his alleged invention of discovery thereof; was patented and described

in printed publications in this and foreign countries before his alleged invention or discovery thereof, or more than one year prior to his application for patent; and was in public use and on sale in this country more than one year prior to this application for patent.

(a) The patents and publications above referred to, in so far as they have at present been ascertained, are as follows:

United States Patents

Patent No. 1,596,017; inventor Harnisch; issue date August 17, 1926.

Patent No. 1,608,518; inventor Minrath; issue date November 30, 1926.

Patent No. 1,701,844; inventor Funke; issue date February 12, 1929.

Patent No. 1,908,044; inventor Nelson; issue date May 9, 1933.

Patent No. 2,184,666; inventor Fredericks; issue date December 26, 1939.

Patent No. 2,196,509; inventor Turner; issue date April 9, 1940. [6]

Foreign Patents

Patent No. 95; country (inventor) Great Britain (Serry); date 1871.

Patent No. 3478; county (inventor) Great Britain (Ascough); date 1871.

Patent No. 5902; country (inventor) Great Britain (Smith) date 1897.

Patent No. 157,209; country (inventor) Germany; date December 28, 1904.

Publications

Emkay (Muench-Kreuzer) Catalog No. 50, July 1, 1941, p. 10 (Received in Division 30, U. S. Patent Office, January 14, 1943, Class 67, sub-class 22.5x).

(b) The instances of prior invention, knowledge, use and sale above referred to, in so far as they have at present been ascertained, are as follows: By the patentees of the patents cited in sub-paragraph (a) above, and this defendant as shown in the catalog publication cited in sub-paragraph (a) above, in this and foreign countries.

(c) Defendant begs leave to add hereto by amendment to this answer additional patents and publications and instances of prior invention, knowledge use and sale, above referred to, which it is at present unable to supply. [7]

9. Defendant, upon information and belief, avers that by reason of the proceedings in the United States Patent Office during the prosecution of the application which resulted in said Letters Patent No. 2,464,361, and the admissions and representations therein made by or in behalf of the alleged inventor in order to induce the grant of said Letters Patent, the plaintiff is estopped to claim for said Letters Patent a construction, were the same otherwise possible, as would cause said Letters Patent to cover or include any device or apparatus manufactured, used or sold by the defendant.

10. Defendant, upon information and belief,

avers that said Letters Patent No. 2,464,361 are invalid and void because the alleged improvement described and claimed therein did not constitute patentable subject matter within the meaning of the Patent Laws, in view of the prior state of the art and what was common knowledge on the part of those skilled in the art; all prior to the date of the alleged invention thereof by the patentee named therein. [8]

Wherefore, the defendant denies that the plaintiff is entitled to the relief prayed for in said complaint, or to any relief, and prays to be hence dismissed with its costs in this cause sustained, and for such other and further relief as to the Court may seem just and proper.

MUENCH-KREUZER CANDLE
CO., INC.,

By LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Defendant

Of Counsel for Defendant:

/s/ D. Emmett Thompson
/s/ Richard von K. Bruns [9]

Acknowledgment of Service attached. [10]

[Endorsed]: Filed April 8, 1953.

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated by and between the parties hereto through their respective counsel that the Answer may be deemed amended by the adding to paragraph 8(a) thereof the following prior art patent:

Patent No. 122, Great Britain (Fields), 1871.

/s/ H. CALVIN WHITE,
Attorney for Plaintiff

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Defendants

It Is So Ordered this 26 day of October, 1953.

/s/ PEIRSON M. HALL,
United States District Judge [11]

[Endorsed]: Filed October 26, 1953.

In the United States District Court, Southern District of California, Central Division

Civil Action No. 15,273-PH

LESTER F. WILSON, Plaintiff,

vs.

MUENCH-KREUZER CANDLE CO., INC., a
corporation, et al., Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled Action having come on for trial before this Court, and the Court having heard and considered testimony of the witnesses produced on behalf of the respective parties and having considered the exhibits offered in evidence on behalf of the respective parties, and having on March 16, 1956 rendered orally the decision of the Court at the conclusion of the trial, the Court now makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure:

Findings of Fact

1. The plaintiff Lester F. Wilson, an individual and the inventor named in the patent in suit, is a resident of San Gabriel, in the County of Los Angeles, State of California.

2. The defendant Muench-Kreuzer Candle Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York

and has its principal place of business in the city of Syracuse, State of New York. This [41] defendant has a regular and established place of business within the Southern judicial district of California, in the City of Los Angeles, State of California.

3. The named defendant Emkay Candle Co., Inc., allegedly a corporation, was not served with the Complaint herein, and the Action has been dismissed as to the alleged defendant Emkay Candle Co., Inc.

4. This Action was instituted by the plaintiff Lester F. Wilson against the defendant Muench-Kreuzer Candle Co., Inc. (hereinafter referred to as defendant) for infringement of United States Letters Patent 2,464,361 granted March 15, 1949 on an application filed March 13, 1945, entitled "Drip Candle", hereinafter referred to as the Wilson patent; such Action being brought under the patent laws of the United States and seeking an injunction, accounting for profits and an award of damages.

5. All the claims, 1 to 6, of the Wilson patent are alleged to be infringed. Defendant answered, alleging as defenses non-infringement, invalidity of the claims in the Wilson patent, and file wrapper estoppel. After answering, defendant in its "Defendants' Statement of Issues Involved" of record in this Action, stated:

"From May 17, 1949 to September 5, 1952, defendant manufactured candles with different aniline dyes impregnated in the wick. Infringement by this candle will not be contested."

“Since September 5, 1952 defendants’ candles have not had dyes in the wick. Infringement by this candle is in issue”.

“This issue involves: Scope of claims, File wrapper estoppel, Limitations imposed by prior art.”

6. The plaintiff Lester F. Wilson is and has been the owner of the Wilson patent.

7. Defendant’s Vice-President and sole witness Norbert C. H. Muench testified to having received a copy of the Wilson patent from one Carl T. Bolen by transmittal letter dated February 28, 1949. Defendant subsequently was notified of its infringement of the Wilson patent by letter written by plaintiff’s attorney dated April 26, 1950.

8. At the trial, defendant relied upon the following prior patents and publications.

United States Patents

Patent No. 1,596,017; inventor Harnisch; issue date August 17, 1926.

Patent No. 1,608,518; inventor Minrath; issue date November 30, 1926.

Patent No. 1,701,844; inventor Funke; issue date February 12, 1929.

Patent No. 1,908,044; inventor Nelson; issue date May 9, 1933.

Patent No. 2,184,666; inventor Fredericks; issue date December 26, 1939.

Patent No. 2,196,509; inventor Turner; issue date April 9, 1940.

Foreign Patents

Patent No. 95; country Great Britain; inventor Sterry; issue date 1871.

Patent No. 3478; country Great Britain; inventor Ascough; issue date 1871.

Patent No. 122; country Great Britain; inventor Fields; issue date 1871.

Patent 5902; country Great Britain; inventor Smith; issue date 1897.

Patent No. 157,209; country Germany; issue date December 28, 1904.

9. The Wilson patent relates to a novel drip candle, so characterized by its formation of wax drippings as the candle burns, which produces during burning and in an unpredictable sequence by reason of the concealment of different coloring materials in the candle, a succession of distinctly and differently colored drippings resulting from the melting of at least a portion [23] of the candle body wax and its acquisition of successively different colors which said portion of the wax would not have before melting. The Court finds this candle to be unique in the candle making art.

10. Defendant admits having had no knowledge of the manufacture or sale of any candle as defined in the preceding Finding 9 prior to the making of defendant's "Make-A-Rainbow" candle, or prior to March 13, 1945, the filing date of the application for the Wilson patent.

11. From May 17, 1949 to and including September 5, 1952, defendant manufactured and sold under the trademark "Make-A-Rainbow", candles which were provided with cotton wicks to which were applied different colored wax, colored by wax-soluble aniline dyes, disposed successively on dif-

ferent portions of the wick along its length, the candles being finished from such prepared wicks by dipping in white wax to candle size. Infringement of the Wilson patent by those candles so made from May 17, 1949 to September 5, 1952, is admitted by defendant.

That candle was discontinued by defendant September 5, 1952, and since that date defendant's candles have been manufactured by first dipping a wick to form a thin white wax taper of substantially $\frac{1}{4}$ inch thickness upon which there is then painted in successive spaced portions molten wax containing aniline dyes of different colors. The candle is then finished by further dipping to produce a finished candle of about 1 inch maximum diameter, having the colored wax portions covered and concealed within the uncolored wax. The last mentioned candles have been sold under the trademark "Make-A-Rainbow" from September 5, 1952 to date.

Defendant's "Make-A-Rainbow" candles have been sold by it within the jurisdiction of this Court following notice to defendant of the Wilson patent.

12. At the trial defendant produced, demonstrated by burning, and the Court observed candles allegedly made in accordance [24] with the disclosures in the patents and publications listed above in Finding No. 8. Among these prior patents defendant made particular reliance upon the United States patents to Funke, Nelson and Fredericks, which had for their primary objectives the making of candles which upon burning would have their

flames colored by materials such as metal salts contained within the candles, and particularly applied to the candle wicks.

13. None of the prior patents or publications relied upon by defendant refers to a drip candle, or reveals any contemplation of making a candle which characteristically is of a wax dripping type.

14. It follows therefore that none of the prior patents or publications relied upon by the defendant contains any teaching of a multi-color drip candle which upon burning will produce successively differently colored drippings in the manner taught by the Wilson patent.

15. The defendant's candle exhibits allegedly following the teachings of Funke, Nelson and Fredericks were inoperative to produce coloring of their flames upon burning, as the patentees represented that the flames would be colored.

16. Flame coloring candles according to the teachings of Funke, Nelson and Fredericks were not known by defendant to have been sold on any market prior to the filing of the Wilson patent application.

17. Plaintiff commenced manufacture and sale to customers in various parts of the United States, including the Western states, of his "Magi-Color" candles made in accordance with the Wilson patent, and in a manner similar to defendant's first "Make-A-Rainbow" candles, within a month following the filing of the application for the Wilson patent.

18. In the burning of defendant's "Make-A-

Rainbow" candle manufactured since September 5, 1952, the dyes applied to [25] the wax taper dissolve in the candle drippings as they are formed, in essentially the same manner as the drippings were colored in defendant's first manufactured "Make-A-Rainbow" candles in which the colored wax was applied directly to the wick.

19. Defendant purposely renders its "Make-A-Rainbow" candles capable of profusely dripping by the use of a smaller wick, (9 ply and similar to the wick size employed in plaintiff's "Magi-Color" drip candles) than is used by candle manufacturers in general, and including defendant, in candles which are not made especially to drip.

20. The Court further finds that suit was filed on December 5, 1949 in the United States District Court, for the Eastern District of Wisconsin, by Plaintiff for infringement of the Wilson patent, against Victrylite Candle Company of Oshkosh, State of Wisconsin, in an Action 6354 entitled "Complaint for Infringement of Patent", which suit after answer by the defendant therein, was concluded by consent decree dated May 5, 1950, holding the Wilson patent valid and infringed; and the Court further finds that plaintiff granted to the said Victrylite Candle Company, by agreement dated April 18, 1950, a license, the granting clause in which reads:

"Reserving in himself, his successors and assigns a single and indivisible right of manufacture, use and sale of candles embodying the invention of said

patent, Licensor hereby grants to Licensee an otherwise exclusive license under said patent limited, however, to the manufacture, use and sale of candles having dyed cores as distinguished from dyed wicks and comprising at different points axially of the candle at least two different core colors."

Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter.

2. Claims 1 to 6, and each of them, are good and valid in law, and all have been infringed by defendant by the manufacture and sale of its "Make-A-Rainbow" candles prior to September 5, 1952, Defendant's "Make-A-Rainbow" candles sold since September 5, 1952, in their condition as manufactured with dyes only at the surfaces of the tapers, infringe only claim 1 of the Wilson patent.

3. Examination of the file history of the Wilson patent application reveals no estoppel against plaintiff's assertion of validity and infringement.

4. The prior art relied upon by defendant does not support defendant's contentions of invalidity in view of the rules and laws as laid down in *J. A. Mohr & Sons vs. Alliance Securities Co.*; *Standard Oil Company vs. Same* (Ninth Circuit Court of Appeals 1926), 14 F.2d 799; *Flakice Corporation vs. Liquid Freeze Corp.*, 130 F.Supp. 471 (D.C. N.D. Cal., 1955); *Dewey & Almy Chemical Company, et al vs. Mimex Company, Inc.* (Second Circuit Court of Appeals) 124 F.(2d) 986.

5. Victrylite Candle Company is neither a necessary nor indispensable party in this Action.

6. Plaintiff is entitled to an injunction and an accounting [27] for profits and damages by reason of defendant's infringement.

7. Each party shall bear its own costs herein.

In accordance with the findings of fact and conclusions of law, it is ordered, adjudged and decreed:

Judgment

1. The Wilson patent in suit No. 2,464,361, and all the claims thereof are good and valid in law, and have been infringed by defendant.

2. An accounting shall be had and is hereby ordered of the total infringing candles manufactured by defendant.

3. Failing agreement by plaintiff and defendant as to the manner of making and rendering the accounting, the sufficiency of the accounting, and compensation due plaintiff by reason of defendant's infringement, plaintiff may apply to the Court for an order directive of the accounting and basis of compensation to plaintiff, to be followed and applied.

4. Effective as of April 30, 1956, defendant, its officers, agents, servants and employees, are hereby enjoined from manufacturing or selling or offering for sale in the United States and its territories, its multi-color "Make-A-Rainbow" drip candles as manufactured in the past, and any other

similar candles which infringe any of the claims in the Wilson patent 2,464,361.

Dated this 12 day of April, 1956.

/s/ PEIRSON M. HALL,
United States District Judge

Acknowledgment of Service attached. [28]

[Endorsed]: Lodged April 2, 1956. Filed April 13, 1956. Entered April 16, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is given that Muench-Kreuzer Candle Co., Inc., hereby appeals to the Court of Appeals for the Ninth Circuit from the judgment entered in this action on April 16, 1956.

Dated this 19th day of April, 1956.

/s/ By CHARLES G. LYON,
Attorneys for Defendant [50]

Affidavit of Service attached. [51]

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents, that American Bonding Company of Baltimore, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Lester F. Wilson, Plaintiff in the above entitled case, in the penal sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to be paid to said Plaintiff, his successors, assigns or legal representatives, for which payment well and truly to be made, the American Bonding Company of Baltimore binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, that whereas, Muench-Kreuzer Candle Co., Inc., Defendant, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse an interlocutory judgment rendered on the 16th day of April, 1956, by the District Court of the United States of the Southern District of California, Central Division, in the above entitled cause granting judgment thereon in favor of the plaintiff [53] as in said interlocutory judgment as set forth.

Now, Therefore, the condition of the above obligation is such that if Muench-Kreuzer Candle Co., Inc., Defendant and Appellant shall prosecute their said appeal to effect and answer all costs

which may be adjudged against them if they fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Further Agreed by the Surety, that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them in accordance with their obligation and award execution thereon.

AMERICAN BONDING COMPANY
OF BALTIMORE,
/s/ By CARL HANNEMAN,
Attorney-in-Fact

Examined and recommended for approval as provided in Rule 8.

/s/ CHARLES G. LYON,
Attorney

Approved this 23 day of April, 1956.

/s/ PEIRSON M. HALL,
Judge

Notary Public Certificate attached. [54]

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS UNDERTAKING

Know All Men By These Presents, that American Bonding Company of Baltimore, a corporation duly organized and doing business under and by virtue of the laws of the State of California and duly qualified for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the United States of America, as Surety, is held and firmly bound unto Lester F. Wilson in the penal sum of Five Thousand and No/100 Dollars (\$5,000.00) to be paid to the said Lester F. Wilson, his heirs and assigns, for which payment well and truly to be made the American Bonding Company of Baltimore binds itself, its successors and assigns firmly by these presents.

Signed, Sealed and Dated this 19th day of April, 1956.

The Condition of the Above Obligation Is Such, that whereas Muench-Kreuzer Candle Co., Inc., Defendant in the above entitled suit, has or is about to take an appeal to the United States Circuit Court of Appeals for the Ninth District, to reverse an interlocutory judgment rendered on the 16th day of April, 1956, by the United [55] States District Court, for the Southern District of California, Central Division, in the above entitled cause as in said interlocutory judgment set forth.

Now, Therefore, in consideration of the prem-

ises, and of such appeal, if the said Defendant and Appellant shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

It Is Further Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

AMERICAN BONDING COMPANY
OF BALTIMORE,
/s/ By CARL HANNEMAN,
Attorney-in-Fact

Examined and recommended for approval as provided in Rule 8.

/s/ CHARLES G. LYON,
Attorney

Approved this 23 day of April, 1956.

/s/ PEIRSON M. HALL,
Judge

Notary Public Certificate attached. [56]

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 58, inclusive, contains the original

Complaint;

Answer;

Stipulation;

Plaintiffs' Interrogatories;

Defendant's Answers to Interrogatories;

Defendant's Objections to Plaintiff's Findings of Fact;

Findings of Fact and Conclusions of Law and Judgment;

Amendment to Findings of Fact and Conclusions of Law and Final Judgment;

Notice of Appeal;

Order Granting Supersedeas;

Designation of Record on Appeal;

which, together with a full, true and correct copy of Bond for Costs on Appeal, Supersedeas Undertaking; and plaintiff's exhibits 1 through 18L, inclusive (38) and defendant's exhibits a through j, inclusive and N through Q, inclusive (20) and four volumes Reporter's Transcript, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing transcript amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court this 17th day of May, 1956.

[Seal] JOHN A. CHILDRESS,
 Clerk
 /s/ By CHARLES E. JONES,
 Clerk

In the United States District Court, Southern District of California, Central Division

Civil Case No. 15,273-PH

LESTER F. WILSON, Plaintiff,

vs.

MUENCH-KREUZER CANDLE COMPANY, et
al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Wednesday March 21, 1956.

Appearances: For the Plaintiff: H. Calvin White, 611 Wilshire Blvd., Los Angeles, Calif. For the Defendants: Lyon & Lyon, by Charles G. Lyon, 811 West Seventh St., Los Angeles, Calif., E. L. Martin, 811 West Seventh St., Los Angeles, Calif. [1*]

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

The Court: Ex parte?

The Clerk: Yes, your Honor.

(Other court matters.)

The Court: Wilson v. Muench Kruezer Candle Company and Emkay.

For the plaintiff, Mr. White?

Mr. White: H. Calvin White.

The Court: And do you have an associate?

Mr. White: No, your Honor.

The Court: Very well.

For the defendants Lyon & Lyon?

Mr. Lyon: Charles Lyon and Earl Martin.

The Court: Very well.

Do you have an opening statement?

Mr. White: Yes, your Honor.

Mr. Lyon: Before the opening statement, may we make some stipulations of record?

The Court: Yes.

Mr. Lyon: I believe it is stipulated by and between the parties that a transcript will be provided for the court's use, one-half to be paid by each party, the cost of the original transcript to be an item of cost for the prevailing party. [4]

Is it so stipulated?

Mr. White: So stipulated.

The Court: Very well.

Mr. Lyon: We also stipulate to the use of soft copies of patents and publications.

The Court: Soft?

Mr. Lyon: Uncertified copies.

The Court: So Stipulated?

Mr. White: So stipulated.

The Court: Very well.

Mr. Lyon: Before Mr. White makes his opening statement, I wish to call to the court's attention one issue in this case that I am not going to press but I am going to save.

The evidence in this case would show that there is an outstanding so-called exclusive license to the Victrylite Candle Company.

The Court: To whom?

Mr. Lyon: To the Victrylite Candle Company.

The Court: Yes?

Mr. Lyon: The Victrylite Candle Company may or may not—I think it is—be a necessary and indispensable party-plaintiff, and has not been joined in this action.

Of course Mr. White disagrees with me on that. But that is a point which I am saving in the case.

The Court: Mr. White? [5]

Mr. White: In connection with that observation, plaintiff takes the position that if the defendant is to make a defense of the plaintiff's relationship with Victrylite, it is something for it to prove in this proceeding and not to merely save.

It might convenience the order of our proceedings, your Honor, if I were to have marked for identification a series of exhibits. Would that meet with your approval at this time?

The Court: Very well. Sure.

Mr. White: The clerk now has for identification as Plaintiff's Exhibit 1 a soft copy of the Wilson patent in suit, 2,464,361, granted March 15,

1949, on drip candle. Does your Honor have a soft copy of that patent?

The Court: Yes. It is marked Exhibit 1.

Mr. Lyon: Excuse me. If I may interrupt at this time. We have provided for the court's use——

The Court: And Exhibit 2 is the file wrapper on that?

Mr. White: The file wrapper.

The Court: It may be introduced.

Mr. Lyon: Surely.

If your Honor cares to, we have a copy of a book of the prior patents relied on, an extra copy, which I have handed to you for your own use, which you can mark up or do whatever you care to. [6]

The Court: It will be marked Exhibit A. 1, 2, and A are received in evidence..

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 1 and 2, and Defendant's Exhibit A.)

(Plaintiff's Exhibit 1 and Defendant's Exhibit A are set out in the Book of Exhibits.)

The Clerk: Do you have a list of your exhibits, Mr. White?

Mr. White: No, I haven't a list.

The next exhibit, No. 3, is a box containing one candle and bearing the label marking Magi-Color, with the patent marking, and at the bottom "Orange Lite, San Gabriel, California."

The Court: In evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 3.)

Mr. White: Throughout I will endeavor to give defendant one each of these exhibits.

Exhibit 4 is a box containing three candles bearing the label Magi-Color Drip Candle.

The Court: 4 is admitted.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 4.)

Mr. White: Exhibit 5 is a copy of a document which is captioned License Agreement, between Lester F. Wilson and Victrylite Candle Company. I have the original of that [7] agreement, which I propose to allow Mr. Lyon to——

Mr. Lyon: We will stipulate you can use a copy, subject to any corrections, if any appear necessary.

Mr. White: Thank you.

The Court: Admitted.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 5.)

[See Book of Exhibits.] [8]

Mr. White: Exhibit 6 is a typewritten tabulation under the heading "Orange Lite, Lester F. Wilson, Victrylite Royalties."

The Court: That is a tabulation of royalties?

Mr. White: Yes, your Honor.

Mr. Lyon: Let us reserve ruling on that, if your Honor please. I may have some questions on that.

The Court: It will be marked for identification.

(The document referred to was marked Plaintiff's Exhibit No. 6 for identification.)

Mr. White: Exhibit 7 I represent to be a certified copy of a complaint for infringement of the

patent in this action filed in the United States District Court for the Eastern District of Wisconsin, Civil Action 4904, Lester F. Wilson, plaintiff, v. Victrylite Candle Company, defendant.

The Court: What date?

Mr. White: Filed December 5, 1949.

Mr. Lyon: I question the materiality of that.

Mr. White: It may be just marked for identification for the time being.

The Court: It will be marked for identification.

(The document referred to was marked Plaintiff's Exhibit No. 7 for identification.)

Mr. White: Exhibit 8 I offer for identification, this being a certified copy of the defendant's [9] answer in the same action, Wilson v. Victrylite.

The Court: The defendant in that action?

Mr. White: In that action; yes, your Honor.

The Court: The defendant Victrylite?

Mr. White: That is right.

The Court: Very Well.

(The document referred to was marked Plaintiff's Exhibit No. 8 for identification.)

Mr. White: Next I offer for identification as Exhibit 9 a certified copy of final judgment in the action of Wilson v. Victrylite Candle Company.

(The document referred to was marked Plaintiff's Exhibit No. 9 for identification.)

Mr. White: Exhibit 10 I offer in evidence, the same being a copy of a registered letter written by me April 26, 1950, to the Muench Kruezer Candle Company, Syracuse, New York, the defendant in this action.

The Court: What was the date of that again, please?

Mr. White: April 26, 1950.

Any objection, counsel?

The Court: Exhibits 7, 8 and 9 are marked for identification; Exhibit 10 is admitted.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 10.)

[See Book of Exhibits.]

Mr. White: I would offer as Exhibit 11 a [10] copy of a letter dated May 3, 1950, addressed to me and signed by Mr. Norbert C. H. Muench.

The Clerk: Is No. 11 admitted?

The Court: No. 11 is admitted.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 11.)

[See Book of Exhibits.]

Mr. Lyon: So the record may be clear, the gentleman referred to is seated on my right.

The Court: One of the defendants, or an officer of the defendant?

Mr. Lyon: Vice president.

The Court: Very well.

Mr. White: I offer next in evidence a box containing two candles, the box carrying the wording "Make-a-Rainbow, self-coloring candles," and at the bottom "Emkay Candles."

The Court: Are these the defendant's candles?

Mr. White: I represent that they are.

Mr. Lyon: Yes, sir.

The Court: It is a box of the defendant's candles?

Mr. White: Yes.

The Clerk: Admitted, your Honor?

The Court: Admitted.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No.

12.) [11]

Mr. White: I next offer as Exhibit 13 a box of defendant's candles, containing two candles, the box carrying the word "Deluxe Make-a-Rainbow Self-Coloring Candles."

The Court: 13 is admitted.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No.

13.)

Mr. White: I next offer as Exhibit 14 a box of defendant's candles, the box containing three candles and carrying the wording "Emkay Wedge Grip Hand Dipped."

The Court: Admitted, 14.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No.

14.)

Mr. Lyon: These are not Make-a-Rainbow candles; is that right?

Mr. White: Those are not Make-a-Rainbow candles. Those are what I understand to be conventional candles.

I next offer for identification as Exhibit 15 a typewritten tabulation of candle sales under the letterhead Orange Lite, San Gabriel, California.

The Court: Is there any objection? Admitted.

Mr. Lyon: If you will represent that these were taken from the original records, I have no objection.

Mr. White: I so represent.

Mr. Lyon: All right.

The Court: Admitted. [12]

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 15.)

[See Book of Exhibits.]

Mr. White: I next offer as Exhibit 16 one of the defendant's catalogs, No. 83, captioned on the cover page, "A Candle Wonderland," and it will be referred to by plaintiff in relation to pages 3 and the back of the catalog.

The Clerk: Is that admitted, your Honor?

The Court: Admitted.

Mr. Lyon: That, I believe, is also listed in the pretrial list of exhibits to be——

The Court: A great many of these are.

Mr. Lyon: As Exhibit M.

The Court: A great many of them are referred to in the pretrial list, and the numbers don't correspond at all.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 16.)

Mr. White: I next offer for identification as Exhibit 17-A and 17-B, two order slips, 17-A bearing the heading "Matilda Bergman," and the second, "Orange Lite."

Mr. Lyon: What is the purpoe of this, Mr. White?

Mr. White: We have in Mr. Muench's answer to the interrogatories the denial, that none of the defendant's agents, officers, employees or representatives had known of the plaintiff's Magi-Color drip candles prior to defendant's manufacture of its Make-a-Rainbow candle. Those slips will [13] identify the shipments into defendant's home town, Syracuse, New York, in 1945.

That I expect to prove.

The Court: It will be marked for identification.

Mr. White: Thank you, your Honor. I have a brief opening statement.

(The exhibits referred to were marked Plaintiff's Exhibits 17-A and 17-B for identification.)

Mr. White: This is a suit brought for infringement of U. S. Letters Patent No. 2,464,361, issued March 15, 1949, to Lester Wilson for drip candle.

The defenses pleaded in the answer are non-infringement and validity. The defendant has admitted infringement to this extent in the record of this case: We have defendant's statement of the issues involved in which it is stated (and I quote):

"From May 17, 1949, to September 5, 1952, defendant manufactured candles with different aniline dyes impregnated in the wick. Infringement by this candle will not be contested."

Now this lawsuit deals with a subject matter, the making of candles, which is an art that has been practiced for generations, if not centuries, all over

the world. It is an ancient art, and one which by reason of its universality and the people who work in it has been thoroughly investigated, I should say. Consequently we would expect any improvement in candles to be of an ordinary nature, I think.

And strange it would be for there to appear for the first time a candle that is made, burns and gives a final performance unlike any candle that, so far as the record in this case shows, was manufactured, known or sold on any market prior to this invention.

Now we in the patent business have occasion in the course of our years of practice to observe many inventions, to appraise them as to their inventive qualities. I have been in business at least long enough to get fair flattop, and I [15] can say in the course of my practice this particular invention will stand out for its originality and simplicity among the relatively few really striking, and I say and I believe that the court will agree after all the evidence in this case is in that it is capable of meeting the standards of invention that have been applied in any of our courts and decisions.

So attractive, so unusual, has been this invention that the defendant couldn't resist it. It has been developed in the interrogatories that the defendant did not know of such a candle having been sold on any market in the world prior to the plaintiff's introduction of his candle.

We will have occasion to appraise the merits of the cited art, but from my study of that art and

knowledge of the facts and circumstances I can only conclude that the defendant made up its mind that it must have this candle, it must manufacture it, it was big enough and powerful enough to get away with it against a financially small inventor.

That I think the evidence will establish.

I am prepared to call Mr. Wilson.

The Court: Do you want to make an opening statement, Mr. Lyon?

Mr. Lyon: Very briefly, your Honor.

The Court: Let me see, the defendant Emkay has not been served.

Mr. White: That is right. [16]

Mr. Lyon: There is no such. I move the dismissal as to the defendant Emkay.

Mr. White: To the best of my knowledge and acquired later there was no Emkay Candle Corporation at the time of the filing of the suit, and I accept the motion to dismiss.

The Court: The case is dismissed as to Emkay Candle Company, Inc., a corporation which is not a corporation.

Mr. Lyon: There has been since created an Emkay Candle Company. There was not at the time of the complaint.

The Court: Very well.

Mr. Lyon: If your Honor please, as Mr. White so aptly stated, the making of candles is an ancient art, consequently any invention in the candle art at this late date must necessarily be a very limited one.

He didn't say anything about his patent. His

patent relates to the candle which, upon burning, will drip successively different colored drippings. When he applied for a patent the Patent Office finally refused to grant any such patent.

Mr. White appealed that to the Board of Appeals and the Board of Appeals had represented to it that certain candles which were in the prior art would not drip different colored drippings.

We have made candles in accordance with the disclosure of those prior patents and they will be burned in the courtroom and they will give different colored drippings, so the basis upon which the Board of Appeals granted this patent is false. [17]

It is also to be noted that the Board of Appeals in ordering the patent issued said they couldn't conceive of why anybody wanted such a candle, but if Mr. Wilson wants it that badly they will give him a patent on it.

Furthermore, there is——

The Court: Is that in the file wrapper?

Mr. Lyon: That is.

The Court: Very well. I see it, Board of Appeals. All right.

Mr. Lyon: Furthermore, you will note upon reading the claims of the patent, that claims 2 through 6 all call for a drip candle having a wax body and a wick containing different coloring material.

Claim 1 phrases that——

The Court: That is, all the claims?

Mr. Lyon: All except claim 1 call for the coloring material to be in the wick. Claim 1 calls for the coloring material to be normally undissolved in the

wax of the candle, which means the same thing in my mind.

Since the early candle which Mr. White referred to, and which we do not contest, comes under the patent, defendant's manufacture of candle is as illustrated on this board. We first take an ordinary wick——

The Court: All right. Let's mark that for identification B. [18]

The Clerk: Just a minute, your Honor.

Mr. Lyon: I think I have it on the list as N.

The Clerk: We have a list already prepared.

The Court: Is that N?

Mr. Lyon: Yes.

(The exhibits referred to was marked as Defendant's Exhibit N for identification.)

Mr. Lyon: Referring to Defendant's Exhibit N for identification, we first take a wick, we dip it to form what we call a core or a thin taper, no dye being applied to the wick, no dye being applied at all until we get a quarter of an inch taper built up, at which time we take what is called muetter farben, or mother color, which is wax with dye dissolved in it, according to the ancient practice for coloring candles, and we put different colored muetter farben along the taper. Then we continue dipping in the normal manner to build up the candle.

The Court: So it comes out a white candle?

Mr. Lyon: It comes out a white candle.

The Court: On the exterior?

Mr. Lyon: On the exterior. And on burning it will

change colors according to the various dyes that it runs into. But there is no dye in the wick, there is no dye——

The Court: That is built according to the teachings of what? Any patent? [19]

Mr. Lyon: No, your Honor. It is according to the teachings of the Muench Kruezer Candle Company.

The Court: Unpatented?

Mr. Lyon: Yes.

The Court: In the public domain, that is your position?

Mr. Lyon: Yes.

Your Honor will notice in the Wilson candle he paints dyes on the wick, and the patent so called for dye on the wick, or dye undissolved in the wax.

We dissolved our dye in the wax before we put it on. So we feel that there is a serious issue, one, the patent was issued on a false premise in that the prior patents to Nelson and Frederichs, which show metallic salts in the wicks of candles will, in fact, color the drippings, and the Patent Office was told they wouldn't, so the patent is invalid. But even if valid, it is not infringed, because of the manner in which the defendant manufactures its candle in which the dye is never in the wick and is dissolved in the body of the candle.

Mr. White: Does the dye never contact the wick, counsel?

Mr. Lyon: The only way that the dye can get in the wick prior to burning of the candle is if it migrates. There will be an issue on that.

You claim that your dye is never in the body of the candle. The fact will show that the dye in [20] a candle will migrate over a period of years, so that the dye will go from the wick of a Wilson candle into the body of the candle.

Mr. White: So we may not have any uncertainty in the court's mind, at this point does the defendant contend that that dye does not go on the wick of the candle?

The Court: Do you mean at any time?

Mr. White: At any time. When its candles go out on the market.

The Court: At any time before it is sold?

Mr. White: Any time before the customer uses it.

Mr. Lyon: Yes.

Mr. White: You had better not cut open one of your client's candles, then.

Mr. Lyon: May I ask your position?

Mr. White: My position is you will find among the exhibits, Exhibit 13, the defendant's candles purchased locally last week, that your dye is on the wick. It is in the core and it is on the wick.

There we are (indicating).

Mr. Lyon: So we may have a clear-cut issue in that regard——

The Court: That is a partially burnt candle?

Mr. White: No. That is a freshly purchased candle, but cut to show where the dye actually is.

The Court: Cut, I see. [21]

Mr. White: Cut, right.

The Court: By the way, you are standing on all six claims? Are all six claims in issue?

Mr. White: Right, your Honor.

Mr. Lyon: Mr. White, we will still stand by our statement that our candle is manufactured in accordance with Exhibit N, and any dye which might possibly contact the wick is a result of migration.

Mr. White: All I have to say is whatever may be the intention as they go out on the market and as the public buys them the dye is on the wick.

The Court: Have you finish your opening statement?

Mr. Lyon: Yes, sir.

Mr. White: There are just a couple of points——

The Court: You have handed me up a book of prior art. Are you going to tell me anything in advance about this prior art which you claim?

Mr. Lyon: Most of that prior art is for the purpose of showing what the Patent Office had before it and the various developments. The most important of the prior art patents are the patents to Nelson, No. 1,908,044, which is a patent relating to a candle with certain metallic salts in the wick. Candles made according to the teachings of Nelson will be offered in evidence. They will be burnt to show that the metallic salts in the wick actually color the drippings of the [22] candle.

The next important——

The Court: Wait a minute now. Nelson doesn't have any diagrams. This is the first patent I ever saw that doesn't have any pictures in it.

Mr. Lyon: It is often that way in chemicals, your Honor.

The next patent in the book——

The Court: Frederichs?

Mr. Lyon: Frederichs, is similarly so. If you will notice there the numeral 3 refers to a strip in which is painted or otherwise ironed to the wick some metallic salts, which we will prove upon burning of the candle will cause colored drippings.

Nelson was cited to the Patent Office. As a matter of fact, Nelson was the basis of the rejection by the examiner of the patent in suit, and you will find in the file wrapper on page 35, pages 34 and 35 of the file wrapper, being Mr. White's brief, in which he states to the Patent Office that the metallic salts or similar color does not and cannot color the drippings of the wax.

Thus we will prove from Nelson and Frederichs patents that this concept is old.

The other two patents which we will call the court's attention to particularly are the Hausamann German patent, [23] of which we have various exemplars, which is simply a white candle with a red core, which, of course, will drip red over a white exterior.

We will offer in evidence Emkay catalogs, being the defendant's catalogs published as early as 1941, in which we advertised a rope, and our Star Pillar candles, a partially burned exemplar of which I am illustrating to the court. You will note that.

The Court: Which is marked for identification?

Mr. Lyon: If you wish it marked, it will be Exhibit O.

The Court: All right.

Mr. Lyon: Which you will note is a white candle——

The Clerk: Just a minute.

Mr. Lyon: You may mark it O.

(The exhibit referred to was marked Defendant's Exhibit O for identification.)

Mr. Lyon: Which of course, has dripped red over a white exterior.

The evidence will show that we have made them with green, red, and various other colored cores.

Of course if you took a candle like that with a red core and another one with a green core and put one on top of the other you would have the Wilson patent.

So it is an elementary rule of patent law that you cannot have invention under those circumstances. Just putting two items of prior art together where they perform the same function that they did perform individually does not result in a new combination.

Mr. White: May I have just a moment, your Honor? It seems that I am slightly on trial for what I said before the Patent Office.

The remarks made about the interpretation by the Patent Office of the Nelson patent, the defendant throws Nelson and Fredericks together.

Now here is something for the defendant to do and to get ready for his proof. If I understand, the words "drip candle" is in neither patent. We are here talking about drip candles. Find those words in either patent.

The Court: I suppose somebody will tell me the

difference between an ordinary candle and a drip candle. I thought they all dripped.

Mr. White: No, they do not, your Honor. The general practice has been to endeavor to make candles for illumination and to consume all the wax and that do not drip. I think we will be able to demonstrate that by some of the defendant's [25] own candles.

Mr. Lyon: Mr. White, your statement to the Patent Office was not——

Mr. White: Permit me to finish, counsel.

Neither of those references has anything to do with the drip candle and my statement to the Patent Office still stands.

Now as to the examples, will the defendant please undertake to show to this court replicas of the examples in either Nelson or Frederichs just exactly how Frederichs and Nelson tell you to make them using such combinations as strontium chloride, sodium chlorine and salts of that nature.

I say that the defendant cannot come into this court and follow an example specifically set forth in either patent and have it show as making out its case. So I say that the Board of Appeals' statement, which I now quote, still stands as good law applicable to this case.

In its reversal of the examiner the board stated:

"We do not find, however, any suggestion in the prior art of the treatment of candles in any way which would produce a result disclosed by applicant. In view of the conclusion that the subject matter is useful and of sufficient importance and

that the claims define a structure which is not anticipated by the prior art, it should be regarded [26] as involving the element of invention, notwithstanding the simplicity of the inventive thought when once arrived at and what appellant has done. Judged by any standards announced by the courts it is entitled to patent protection."

So the contest in the Patent Office was one based upon interpretation of the writings of the applicant and the prior art. We are here to compare actual performances.

Does your Honor care now to hear from Mr. Wilson?

The Court: I have no pleasure about anything at all. It is your lawsuit. I am here to listen.

Mr. White: Mr. Wilson, will you take the stand and be sworn, please?

LESTER F. WILSON

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name in full, please?

The Witness: Lester F. Wilson.

The Clerk: Your address?

The Witness: 107 East Longdon Avenue, San Gabriel.

The Court: Before you proceed, Mr. White, I would like to ask a question.

You called my attention to the statement in the defendant's statement of issues involved on pretrial to the effect that "From May 17, 1949, to Septem-

(Testimony of Lester F. Wilson.)

ber 5, 1952, defendant [27] manufactured candles with different analine dyes impregnated in the wick. Infringement by this candle will not be contested.”

Is that candle here? Do you have that?

Mr. Lyon: Your Honor, my information was, and it is so stated I believe in one of the papers on file, that in 1952 we discontinued making that candle and they have all been sold. We don't even have one left in the warehouse.

The Court: But you do concede that that was infringement?

Mr. Lyon: Yes, your Honor. In those early candles, what we did was take the multicolor and paint it directly onto the wick according to the teachings of the Wilson patent. Now we don't.

The Court: Now what I want to know, Mr. Lyon, is this: If you concede infringement how can you still attack the validity of the patent because if the patent is void there cannot be any infringement.

Mr. Lyon: Well, that is a question of semantics. We concede infringement if valid, put it that way. We attack the validity of the patent.

The Court: Very well.

Direct Examination

Q. (By Mr. White): Mr. Wilson, you are the inventor named in the drip [28] candle patent here in suit? A. Yes.

Q. Have you at all times yourself had continuous ownership of the invention and the patent?

A. Yes, sir.

(Testimony of Lester F. Wilson.)

Q. In about what year did you start in the candle business? A. About the spring of 1939.

Q. Where were you then located?

A. At 556 West Mission Drive in San Gabriel.

Q. Are you now at the same location?

A. Directly across the street.

Q. Prior to entering into the making of candles, what education, if any, did you have in chemistry?

A. None whatsoever.

Q. As a matter of fact, what was the extent of your formal education?

A. Part of a 2-year business course in high school.

Q. Now following your starting in the candle business in 1939, did you originate any candles?

Mr. Lyon: I will object to that.

Q. (By Mr. White): After starting into the candle business, what kind of candles did you make?

A. Novelty candles. [29]

Q. What do you mean by novelty candles?

A. Candles such as had never been on the market before to my knowledge.

Mr. Lyon: I object to that as calling for a conclusion of the witness, "never been on the market before," and move that it be stricken.

The Court: I think that is a conclusion of the witness.

What did you make, candles in the shape of oranges and pine cones?

The Witness: Yes, sir.

(Testimony of Lester F. Wilson.)

The Court: Camellias and gardenias and roses, and so forth?

The Witness: Yes, sir.

The Court: Each with a different scent?

The Witness: Each with a different scent, and some of them have a variety of colors.

The fact of the matter is I think I had prior to 1945, 17 different candles, mostly scented candles, I named them. And then there would be a variety and each candle in a variety of colors.

The Court: And shapes?

The Witness: Well, they had names on them. of colors or shades of colors.

The Court: You mean you named them like Betty, Anna, Joe or Jack? [30]

The Witness: No. The orange candle we called Orange Lite.

The Court: I see. And the cone?

The Witness: The cone would be pine, and so forth.

The Court: And they were colored to correspond with what they were supposed to imitate?

The Witness: Yes, sir.

The Court: In other words, a pine cone would be green.

The Witness: Well, it could be green. I made them originally to look like a dry pine cone, kind of a brownish color.

Q. (By Mr. White): Will you relate the circumstances that occasioned your development of the candle shown in the patent here in suit?

(Testimony of Lester F. Wilson.)

A. I had many calls by customers, that is, in the retail department of my business, for candles that people could drip on bottles, that would be an ordinary tapered candle with a solid color to make a decoration, an ornament for a centerpiece on a table.

Most of the candles made are of a white core, with just a little thin coating of wax, and the cheap solid colored waxes that they were looking for were hard to find. People kept asking me for them, and I wondered if it would not be possible to make a candle that would drip more than one color [31] and still look white. Then I went to work on it.

Q. At that time were the majority of candles as manufactured in the candle industry of the drip type or of a non-drip type?

A. Of a non-drip type. That has been the aim and in most advertisements of candles they advertise that they do not drip.

The Court: The wax burns?

The Witness: That is the idea.

The Court: What do they put in to make it burn?

The Witness: Waxes will burn, but it is the construction and composition whether they will drip or will not drip.

The Court: You mean it is the shape?

The Witness: Not necessarily. It would be the size of wick or the composition of the wax and things like that.

Q. (By Mr. White): At that time there were

(Testimony of Lester F. Wilson.)

drip candles and non-drip candles generally known?

A. Well, there were candles.

The Court: There were drip and non-drip candles?

The Witness: As far as I know there was no candles advertised as drip candles.

Q. (By Mr. White): Will you continue with your account of the circumstances leading to the development of your candle? [32]

A. Well, I got this idea and I thought it would be a very good idea if it would be possible to do, and about the first thing I had done—I had never made a straight ordinary, what we call a tapered candle—I went over to a refrigerator place and got some square, I should say rectangular, heavy wire frames, took them home and soldered hooks on opposite sides and stretched a wick through these hooks to hold the candle tight and straight.

Then I took a solution, a heavy solution of dye and paraffine, melted it together and painted it on these wicks, let it cool, and then I dipped the wick in a body of melted wax, a container, I should say, and kept doing that until I built up a candle that I thought was about the right size such as Mr. White has in his hand there now.

The Court: You dip them in white wax?

The Witness: Yes.

Mr. White: The witness has referred to two candles that I have removed from Plaintiff's Exhibit 4, one being a candle which has partially been cut in sections and the other one has been uncut.

(Testimony of Lester F. Wilson.)

MQ. Mr. Wilson, will you compare the appearance of the candle as we see it in the section with what you then made.

A. It is practically the same.

Q. Incidentally, what candles are these that I hold in my hand? [33]

A. Those are the candles that we put on the market every day.

The Court: What do you call them?

The Witness: We call them Magi-Color drip candles.

Q. (By Mr. White): And you have been manufacturing those under the name Magi-Color for how long approximately?

A. Since early in 1945.

Q. Mr. Wilson, I will ask you, and with the court's permission, to burn one of these candles.

The Court: That is not one out of the exhibits, is it?

Mr. White: No. I suggest that we burn one of them from the exhibits.

The Court: The exhibit has two candles. I will mark on them——

The Witness: Do you want to scratch it on?

The Court: I was going to mark them 1, 2 and 3.

Mr. White: The ones that are not going to be burned can best be identified by tying a card to the wick.

The Court: Here is one that is split here in this Exhibit 4, which will be marked 4-A.

(The exhibit referred to was marked Plaintiff's Exhibit No. 4-A for identification.) [34]

(Testimony of Lester F. Wilson.)

The Court: I am handing the witness the third candle. Put it up here so we can see it.

The Witness: Yes, I will. This candle doesn't quite fit.

The Court: Was this removed from Exhibit 4?

Mr. White: Right, your Honor. No, that was taken from mine.

Q. (By Mr. White): Now, Mr. Wilson, while this candle is burning, will you describe to the court what we see in the cut section of the Exhibit 4 candle?

A. Well, you see the white wax on the outside to conceal and make the—well, if I could use the word "gimmick," sales gimmick, to make a mystery candle, if you want to call it that way, and the wax that is on here hasn't spread through the candle a great deal.

Q. When you say "on here,"——

A. On the wick.

The Court: Is that wax on the wick?

The Witness: It is a combination of wax and aniline dye.

The Court: In between the colors the wick is white?

The Witness: Yes.

The Court: And it seems to be smaller.

The Witness: No. It is the same size wick, but when you put the wax on, it makes the wick a little larger or seem a [35] little larger.

The Court: That is colored wax that you put on the wick?

(Testimony of Lester F. Wilson.)

The Witness: Yes, sir.

The Court: I see. On these intervals?

The Witness: Yes, sir.

The Court: How many colors have you got on this?

The Witness: Fourteen colors in the candle. Not 14 different colors, but 14 different——

The Court: Stations?

The Witness: Stations, yes.

The Court: How many different colors—three.

The Witness: Oh, no. About seven.

Q. (By Mr. White): That candle is made using what kind and quality of wax?

A. I use paraffine, known to the trade as 138-40 melting point, with about 10 per cent stearic acid.

Q. Does the quality of the wax have anything to do with the tendency of the dye to migrate within it?

A. I am not really a chemist on that, but I would think so.

Q. In what respect would you think so.

A. I believe the lower quality wax has a little more oil. I am not sure. I don't know.

The Court: It has a little more oil; what does that [36] mean, that it migrates?

The Witness: It might.

The Court: In other words, the higher the quality of the wax, the less migration of the color?

The Witness: I would think so.

Q. (By Mr. White): Had you, prior to the making of this candle, Mr. Wilson, known of the

(Testimony of Lester F. Wilson.)

manufacture or sale any place in the world of a single candle which would burn from dyeings concealed within it to produce different colored drippings? A. No, sir.

The Court: Well, the record will show that the candle is burning, and that it was a white candle and now there is red there along one side of it. About three-quarters of an inch has burned.

Q. (By Mr. White): Having developed the candle as you have described it, Mr. Wilson, what did you then do to acquaint your customers with this candle?

A. I have been making these different novelty candles since '39, and we had customers—by “customers” I mean wholesale customers—throughout the United States, and when I got this candle ready for the market, I thought it was perfected, I sent them samples, I sent them literature, and generally it was samples to start with, so they could really see what the candle did. [37]

Q. Where were your customers in 1945?

A. All over the United States. A little sparser in the South?

Q. Did you have customers in New York?

A. Yes?

Q. Pennsylvania? A. Yes.

Q. New England States?

A. Every state in New England.

Q. Mr. Wilson, you have compiled a tabulation of your yearly sales of these Magi-Colored drip

(Testimony of Lester F. Wilson.)

candles from the year 1945 through 1955, have you not? A. Yes, sir.

Q. As we see it in Plaintiff's Exhibit 16?

The Court: What is that?

Mr. Lyon: 15, I think.

The Court: 15, I believe.

The Witness: 16 this is marked.

The Court: That is a mistake.

Mr. White: I beg your pardon. 15.

Q. (By Mr. White): Will you tell the court what happened in sales and as signified by your tabulation there?

A. Well, the sales mounted, and mounted quite rapidly, for a small outfit, until I had too much competition from large candle companies, such as Emkay and Victrylite, that had [38] large advertising funds and many salesmen throughout the world?

Q. Who do you mean by Emkay?

A. Muench Kruezer.

Q. I notice that according to this tabulation the sales increased to a maximum of about 475,692 in the year 1951, and then seemingly have decreased steadily to the present. When did you notice, first, the most active competition by the larger manufacturers to whom you refer?

A. Well, I knew they were in the field from 1950, but they didn't really hurt me until 1952. They evidently had got around the country with a candle by that time.

Q. What, in the year 1951, was the total of your

(Testimony of Lester F. Wilson.)

personnel in your candle manufacturing business?

How many people did you have?

A. Eight people.

Q. How many do you have at present?

A. Three.

Q. To what do you attribute that drop?

A. Infringement on my patent.

Q. What did you do in connection with your other lines of candles at the time Magi-Color came out in 1945?

A. I manufactured them along with Magi-Color for a while.

Q. How long? [39]

A. Until the spring of 1950. In the fall of '49 I notified all of my customers that I would no longer manufacture the novelty candles, with the exception of Magi-Color.

Q. Why did you decide not to manufacture them?

A. I thought it was doing well enough. I would have to either enlarge, hire more labor, and it was a nice business and it was still growing, and there was no reason for it to stop growing, I could do a better job by concentrating on one candle.

Q. Mr. Wilson, I hand you plaintiff's Exhibit 3 and ask you if you will tell the court what it is.

A. This is the first label we had on Magi-Color drip candles, and this is bearing the patent number.

Q. When did you first commence selling the product in that box so labeled?

A. With the patent number?

(Testimony of Lester F. Wilson.)

Q. Yes.

A. Very shortly—well, some time in '49. Probably within 30 days of the date on the patent.

Q. After March 15, 1949? A. Yes.

Q. You spoke of competition by a Victrylite Company; will you tell us what happened in relation to that competition?

A. We filed suit in federal court in Milwaukee.

Q. Why did you file suit? A. How is that?

Q. Why did you file suit?

A. On an infringement of my patent.

Q. What had Victrylite been doing?

A. They had been making candles.

Q. What kind of candles?

A. Magi-Drip candles.

Q. How were they made?

A. They were made the same way I make mine.

Q. By that you mean what?

A. By successive colorings of dyes in the candle, and concealing them so that the candle looked white and when it would drip, it would drip several different colors.

The Court: Why does this all drip on one side? Why doesn't it drip all around?

Mr. Lyon: The wind is blowing, your Honor.

The Witness: It is the way the wind is coming on it.

They will actually go on one side more than they do the other, sometimes.

Q. (By Mr. White): What did you do then in relation to the Victrylite infringement?

(Testimony of Lester F. Wilson.)

A. We filed suit in the federal court of Milwaukee. We received a consent decree and licensed them to make candles after my patent. [41]

Mr. White: I call the court's attention to Exhibits 7, 8 and 9, being respectively certified copies of the complaint, answer, and final judgment entered in civil action 4904, filed December 5, 1949, in the U. S. District Court for the Eastern District of Wisconsin, Lester F. Wilson, plaintiff, vs. Vicitrylite Candle Company, defendant. I urge the materiality, relevancy of these documents as exhibits in this case, because it shows another infringing manufacturer had concluded the controversy as of that time between it and the plaintiff by subjecting to a final judgment, according to which relief was granted as prayed for in the complaint with certain reservations that had to do with merely the entry of judgment for damage, profits, or costs. [42]

And I further urge the materiality for the reason that pleaded in the answer of that case we find the bulk of the patents, the prior art here relied upon by the defendant.

The Court: Do you have an objection, you say?

Mr. Lyon: Well, your Honor, probably my objection to the Exhibits 7, 8 and 9 is more to its weight than to its materiality. After all, your Honor is familiar with the fact that in consent decrees that plaintiff may have secured against other people of course it has no binding effect upon this defendant and is really not relevant with respect to the patent.

(Testimony of Lester F. Wilson.)

We don't know what was paid anybody. The judgment itself says that there will be no damages, profits or costs. We do know that the Victrylite Candle Company secured an exclusive license under this patent, but we also know this—this is a rather significant thing—is this the state of the record that you intend to leave it in with respect to the Victrylie Candle Company.

Mr. White: No. I have Exhibit 5 which is a tabulation of the royalties that Victrylite Candle Company paid.

Mr. Lyon: Are you going to let the court know that the Victrylite Candle Company ceased paying royalties because they thought so little of it and that you had to sue them?

Mr. White: I am going to go into that later.

Mr. Lyon: They didn't think so much of the patent [43] because even after taking out a license they refused to pay a royalty.

The Court: These are admitted in evidence, Exhibits 7, 8 and 9.

(The exhibits referred to were received in evidence and marked Exhibits Nos. 7, 8 and 9 respectively.)

The Court: Whether counsel is correct or not, I think both of you know that in so far as stipulated judgments in patent cases are concerned, I refuse to sign them except there be a provision in them that as between the parties the patent is valid, and that is as far as it can go.

(Testimony of Lester F. Wilson.)

Mr. White: I think it is a matter of the weight of the evidence.

I should like to introduce as Exhibit 5 in evidence the license agreement.

Mr. Lyon: It is already in evidence, Mr. White.

The Court: It has been admitted.

Mr. White: I am sorry if it has already been received in evidence.

Q. Mr. Wilson, I show you Plaintiff's Exhibit 6, which is a tabulation of Vietrylite royalties and will ask you to tell the court what that tabulation represents.

A. Well, the tabulation represents the amount of money, the number of candles and the amount of money, paid each quarter in each year of the life of the contract. [44]

The Court: Up to now?

The Witness: Up to now; yes, sir.

The Court: With Vietrylite?

The Witness: With Vietrylite. It was a steady increase up until 1952 when they objected to paying because I couldn't put Muench Kruezer out of the market and it is still in effect and they are still paying certain royalties.

Mr. White: Is Exhibit 6 in evidence, Mr. Clerk?

The Clerk: Not yet.

Mr. White: I would like to formally introduce it in evidence, your Honor, Plaintiff's Exhibit 6.

The Court: Admitted.

(Testimony of Lester F. Wilson.)

(The exhibit referred to was marked Plaintiff's Exhibit No. 6 and received in evidence.)

[See Book of Exhibits.]

Mr. White: Now at this point the court undoubtedly, in view of counsel's remarks, will be interested in the nature of this license with Victrylite.

The Court: Do you have a copy of that?

The Clerk: It is on your desk, your Honor.

The Court: You are referring now to Exhibit 5?

Mr. White: Yes, your Honor, the definition under "License Grant."

I would like to read that, bearing in mind that we are talking about the Wilson patent and all its six claims. Before reading from the license agreement, may I compare for [45] your Honor Claims 1 and 2 of the Wilson patent.

Claim 1: "A drip candle comprising a wax-like body, different wax-soluble dyes normally concealed within the interior of the body at different locations longitudinally thereof and normally undissolved in the wax of said body, —" Now that claim does not at that point or thereafter limit the dyes as being on the wick or such and such a distance from the wick or anything of the sort. It says these "dyes normally concealed within the interior of the body at different locations longitudinally thereof and normally undissolved in the wax of said body."

Of course all we have to do is take a look at the cross-sectional cut of the candle and see that that is exactly how the dyes exist.

The claim concludes with the statement: "—said

(Testimony of Lester F. Wilson.)

dyes dissolving in the melted wax of the body to form multi-colored drippings as the candle progressively burns."

Now that claim means this, they can be infringed by dye on the wick or by dye located elsewhere within the body of the candle, just so long as it otherwise corresponds to the terminology of the claim. [46]

Now no one in this business making these multi-colored drip candles has ever done anything except with one objective, and that is to make a candle in which the dye bodies are concealed in the wax body of the candle, because if the observer could tell what color the candle is going to drip next it would lose one of its greatest assets, and that is the unpredictability of the dripping colors.

So the claim says it is only concealed in order for these colors to come out distinctly identifiable as different colors. As your Honor will observe from the candle now burning the dyes have to color one at a time, and that comes about by reason of the longitudinal basing in the candle. And of course it is evident that those dyes normally are undissolved in the melted wax of the body.

Mr. Lyon: I object to counsel testifying in this case. This isn't the time to argue the case.

Mr. White: I am merely pointing out to the court what is the meaning of the claim in order that we can interpret the paragraph under the license grant to Victrylite.

(Testimony of Lester F. Wilson.)

Mr. Lyon: I think the document is the best evidence of what it means.

The Court: Yes, I think so. I think you can argue that at the appropriate time, counsel, rather than throughout the trial.

Mr. White: Very well. [47]

In Claim 2 then we have the language:

“A drip candle having a wax body and a wick containing a colorful material * * *” So we have that limitation in Claim 2 that does not appear in Claim 1.

The granting provision in Exhibit 5 reads as follows: “Reserving in himself, ——”

The Court: Let me see. The license grant here is the exclusive license under said patent, limited, however, to the manufacture, use and sale of candles having dyed cores as distinguished from dyed wicks and comprising a different points axially of the candle at least two different core candles.

Mr. White: That is right.

The Court: That is not a dyed wick, they are not licensed to produce candles under Claims 2, 3, 4, 5 or 6, is that right?

Mr. White: That is right. Those are the candles that defendant admitted having infringed.

Victrylite has no right whatever under such claims. So wherein is Victrylite even, shall we say, a permissible party, much less a necessary or an indispensable party?

In so far as the other claim is concerned, the patentee here did not grant Victrylite a license that

(Testimony of Lester F. Wilson.)

would exclude himself, but he reserved that right. So therefore what he [48] did grant Victrylite was a small parcel out of the patent.

Q. Mr. Wilson, I show you Plaintiff's Exhibit 12, which contains two candles—may I place them here so you can both see them—and ask you how those candles came into your possession.

A. I had a friend of mine order them through the Los Angeles branch of the Muench Kruezer Candle Company.

Q. In what year? A. 1953.

Q. And what time of the year?

A. I believe it was February. I can't remember without looking at the order.

Q. Would you, being a candle maker, describe them to the court from their appearance?

A. I would say that it was a candle that had a concealed dye in the wick, along the wick, and covered with a white wax to make it outwardly appear as a white candle.

Q. Did you ever burn any of those candles?

A. Yes.

Q. How did they perform upon burning?

A. Approximately the same as mine; that is, in effect.

Q. I will ask you to describe particularly the colorings which we see along and about the wick.

The Court: That is the candle of Exhibit 12 which is cut in half? [49]

The Witness: Yes.

Mr. White: That is correct, your Honor.

(Testimony of Lester F. Wilson.)

The Witness: Well, they are run together very badly, they look to me like analine dyes placed along the wick or on the wick, it is hard to tell which without a microscope. Maybe you couldn't then.

Q. (By Mr. White): What happened to that dye as the candle burned?

A. It diffuses into the total wax as it melts.

Q. And it diffuses from where in relation to the surface of the wick?

A. From the core of the candle right around the center of the candle around the wick at the surface of the wick throughout the whole body as it burns.

The Court: When it burned was that a drip candle?

The Witness: Yes, that is the object of it.

The Court: I mean the one you are talking about, Exhibit 12?

The Witness: Yes, sir. It is advertised as such.

Mr. White: At this point I should like to read from the back of Exhibit 12:

"Make-a-Rainbow. Self-coloring candles.

"It's beautiful * * * astonishing the way these pure white candles melt in magic patterns of multi-colored wax." [50]

The next column: "Rainbow candles make different, unusual gifts * * *"

The last column: "Entertaining soon? For a centerpiece sure to be a conversation piece, burn Rain-

(Testimony of Lester F. Wilson.)

bow Candles. Hear guests exclaim, then marvel as the brilliant colors emerge and blend.” [51]

Q. (By Mr. White): Mr. Wilson, I now hand you Plaintiff’s Exhibit 13 and will ask you to——

The Court: Now, let’s see. 13 is a box of defendant’s candles, the Deluxe?

Mr. White: Yes.

Q. (By Mr. White): Where did you obtain those candles, Mr. Wilson:

A. I bought those in San Fernando.

The Court: When?

The Witness: About a week ago. Last week. I don’t have the exact date. It was last week.

The Court: That is near enough.

Q. (By Mr. White): I believe you cut open one of those candles, which counsel has mutilated?

Mr. Lyon: I plead not guilty. My client did.

The Witness: Yes, sir.

Q. (By Mr. White): Will you describe for us that candle?

A. It is to all intents and purposes the same as the Magi-Color drip candle, or the previous candle bought in 1953.

The Court: This candle seems to have a kind of an off—the outer coating seems to be a pure white and the other seems to be kind of an off color. Paraffine and wax, is that the difference?

The Witness: I imagine.

The Court: Which is paraffine? [52]

The Witness: It is practically all paraffine.

The Court: Practically?

(Testimony of Lester F. Wilson.)

The Witness: I would say in my candles. I imagine that is all paraffine, a big percentage.

The Court: That is a petroleum product?

The Witness: Yes.

The Court: They don't make it out of mutton?

The Witness: Oh, no. Paraffine is a petroleum product.

Q. (By Mr. White): Mr. Wilson will you burn for us——

The Court: It isn't going to burn before 12:00 o'clock, so you had better not start it.

Mr. White: Shall we recess?

The Court: Is that your next project?

Mr. White: That is the next burning exhibit, your Honor, which I thought we would start in progress. But if you would prefer to light it in the afternoon session——

The Court: It is only five minutes.

What shall we do with this candle that is now burning? Has that burned enough to satisfy everybody?

Mr. Lyon: I think it is time to blow it out.

The Court: Has that burned enough to satisfy everybody?

Mr. White: If it is satisfactory to the court, it is satisfactory to us.

The Court: It has demonstrated to me that it has different colors. [53]

Mr. Lyon: That's right. You can blow it out if you like.

Mr. White: Yes.

The Court: All right.

We will recess until 2:00 o'clock.

(Thereupon, at 11:55 o'clock a.m., a recess was taken to 2:00 o'clock p.m.) [54]

The Court: Any ex parte matters?

The Clerk: No.

The Court: Proceed.

LESTER F. WILSON

the witness on the stand at the time of recess, having been heretofore duly sworn, was examined and testified further as follows:

Mr. Lyon: If the court please, we placed on the desk what has been marked by the clerk as Defendant's Exhibit F, which is a Star Pillar candle as manufactured by the defendant since as early as 1940. Since it is a rather immense thing it takes a rather long time to burn so I would like to light it now.

Mr. Muench: Mr. Lyon, I would suggest that you put a piece of paper under that.

The Court: Is this a dripless candle or a dripper?

Mr. Lyon: This is a candle that has a red core and it will drip.

The Court: I have too many candles already here at one time.

Mr. Lyon: We can put it somewhere else. I just wanted to burn it in the court room. [55]

The Court: When we get to your case, we can light your candles.

Mr. Lyon: All right. It is going to take a long time to burn so I thought we might start it now.

(Testimony of Lester F. Wilson.)

Mr. White: For the present I would just like to ask the witness to light the candle before him, which is taken from the box of plaintiff's Exhibit 13 candles.

The Witness: (Lighting exhibit)

The Court: Now this is one of defendant's candles?

Mr. White: Yes, your Honor.

The Court: Let me see that box. I want to see the cut-away portion of the candle.

(The exhibit referred to was passed to the court.)

The Court: Let me see the cut-away portion of Plaintiff's Exhibit 4.

(The exhibit referred to was passed to the court.)

The Court: The record will show that a candle from box No. 13 has been lit.

Direct Examination—(Continued)

Q. (By Mr. White): Mr. Wilson, I will ask you to identify, if you can, Plaintiff's Exhibits 17-A and 17-B for identification.

A. That is an order for candles we received in 1945 from Syracuse, New York. [56]

A. An order for what?

A Magi-Color drip candles, six dozen dozen of three.

Q. The candles, Magi-Color drip, which you were then making and selling, were contained in

(Testimony of Lester F. Wilson.)

boxes corresponding to Plaintiff's Exhibit 3, is that right? A. Yes, sir.

Q. And was that order filled and the delivery made? A. Yes, sir.

The Court: Let me see. Is this the same order, 17-A and 17-B?

The Witness: Yes.

Mr. White: Yes.

Q. Will you distinguish those, Mr. Wilson?

The Court: One says "Shipped to E. W. Edwards & Son, Syracuse, New York" — I see — ordered from E. L. Kirby, 525 East Seventh Street.

Who is that?

The Witness: He was one of our representatives at that time.

The Court: Shipment charged to E. W. Edwards & Son. Very well.

Mr. White: These are offered in evidence according to their numbers, Exhibits 17-A and 17-B.

The Court: Admitted.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 17-A and 17-B.) [57]

Q. (By Mr. White): Mr. Wilson, can you give the court an estimate of the damage which you have suffered by reason of the defendant's infringement?

Mr. Lyon: I object to that, your Honor, as calling for a conclusion of the witness, and assuming a fact——

The Court: I think that is hardly the way to prove damages.

(Testimony of Lester F. Wilson.)

Mr. White: I am not undertaking to prove damages, your Honor; merely to indicate the seriousness to this plaintiff of the encroachments upon his business.

The Court: That doesn't enter into the validity of a patent.

Objection sustained.

Mr. White: You may cross examine, counsel.

Cross Examination

Q. (By Mr. Lyon): Mr. Wilson, what is a candle follower, do you know?

A. I don't know. I never heard the expression before.

Q. This question of a drip vs. a non-drip candle, are you aware of the fact that the Federal Trade Commission has issued orders prohibiting candle manufacturers from claiming that their candles are dripless? A. No, sir.

Q. Do you agree with them that to some extent all [58] candles drip?

A. Under certain conditions, yes.

Q. That depends principally on the state of the draft in the room, the size of the wick, and so on; that is generally correct, is it not?

A. It could be many things.

Q. Let's take a look at Exhibit 4. Calling your attention to the half candle where it has been cut away in Exhibit 4, do you recognize that the dye covers a larger section of the candle than does the wick, does it not? A. Yes.

(Testimony of Lester F. Wilson.)

Q. Some of the dye has migrated into the body of the candle, is that right? A. Yes.

Q. Do you know how long these samples have been in existence, these candles, Exhibit 4?

A. Not that box, no.

Q. Do you happen to know whether it is a period of months or days or years?

A. Let me see the top of the box.

Is that the original box?

Mr. White: Yes.

The Witness: That candle——

Mr. White: No. I am sorry.

The Witness: The candle in the other box, yes, I can [59] tell you.

Q. (By Mr. Lyon): Which other box are you referring to? Exhibit 3?

A. Yes, sir, that is Exhibit 3.

Q. Can you tell me how long this has been around? A. At least five years.

Q. The older a candle is, a candle like this that has a dye soluble in the wax, the more migration of dye will take place, is that not correct?

A. I imagine it depends a good deal on the quality of the wax used.

Q. In the box corresponding to Exhibit 4, which was furnished to us by your counsel, I find a piece of colored paper with some printing on it. Is a card like that generally placed in each one of your candle boxes? A. Yes.

Q. And do you recommend to the purchasers of your candles that they place one candle right on top

(Testimony of Lester F. Wilson.)

of the other and make a compound candle that way?

A. No.

Q. What does this language mean——

A. Exactly what it says.

Q. —“When this candle has burned down to a short stub, place another one on top of the burned candle and they will keep building up?” [60]

A. Just what it says. That is the best I can explain it.

Mr. Lyon: I will offer the card taken from Exhibit 4—there is one in Exhibit 4?

The Court: Yes.

Mr. Lyon: I think it should be identified somehow in the record.

The Court: 4-A.

The Clerk: 4-A, -B, -C, -D, your Honor.

The Court: All right.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 4-D.)

Q. (By Mr. Lyon): Prior to the time when you invented or conceived the idea of a candle such as is set forth in your patent, were you aware of the fact that there was on the market various candles that would drip over a white exterior a different colored wax?

A. I don't know that I was. I am not sure what candles I knew about at that time in that respect.

Q. Were you generally conversant in 1945 with catalogs and the literature of your competitors?

A. Not too well.

Q. Did you ever see either an example of or a

(Testimony of Lester F. Wilson.)

picture in a catalog of a star pillar candle as manufactured by the Muench Kruezer Candle Company?

A. Yes.

Q. Had you seen such a candle prior to the conception of the invention of your patent in suit?

A. I hadn't seen the candle; I seen the advertisements.

Q. And you had seen the advertisement where it stated that it drips red wax over a white exterior?

A. No.

Q. I show you what has been identified by the clerk as Defendant's Exhibit C, the same being a Muench Kruezer catalog No. 50, a copy of which is certified to have been received in Division 30 of the Patent Office January 14, 1943, [62] and I show you a page illustrating a star pillar candle and I call your attention particularly to No. 228, "Star pillar candle, 11½ inches high, Christmas red or Christmas green, also white with red center. This candle drips red colored wax over the white outer shell."

Now had you seen that catalog prior to the making of your invention?

A. The only time I ever seen that advertised prior to that probably was in a trade magazine such as gift wares, and probably didn't read the advertisement.

Q. Now in your direct testimony I believe you stated that you put, within 30 days after March 15, 1949, the marking "United States Patent No.

(Testimony of Lester F. Wilson.)

2464361'' on your packages for your Magi-Colored candles, is that correct?

A. Approximately, I would say.

Q. Then there was a period of 30 days after the patent issued in which you were selling candles without marking the patent number on the box, is that right?

A. At that time it had a patent pending label on it.

Q. After the patent was issued?

A. As soon as I could get the labels from the printing shop I put them on.

Q. Can you answer my question, was there a period of approximately 30 days after the patent issued when you were selling candles in the old boxes?

A. It could have been.

Mr. Lyon: Under those circumstances, your Honor, I would appreciate, if the plaintiff should win this suit, his recovery must date from the date of written notice. When a patentee has sold a patented article without a patent notice he cannot recover from any infringer until he can show written notice.

The Court: We will argue the case when we get to the end. Do you not think that that is a good idea?

Mr. Lyon: All right, sir.

May I have Exhibits 12 and 13, Mr. Clerk?

(The exhibits referred to were passed to counsel.)

Q. (By Mr. Lyon): Calling your attention to the candle in Exhibit 12, which is split in half and

(Testimony of Lester F. Wilson.)

the various dye sections, I ask you if in your opinion the dye in that candle is undissolved in the wax.

A. Well, I am not chemist enough to tell whether it is dissolved or in suspension or just in there.

Q. Well, it is certainly spread out into the body of the candle, isn't it? A. Yes.

Q. Now calling your attention to the wick, can you testify that any of the dye has penetrated the wick?

A. I think there is dye in the wick. [64]

A. Do you think that the wick has been colored along those sections, the color of the various dyes? A. It looks like it to me.

Q. Taking a look at Exhibit 13, the wick in this broken part has come loose from the candle.

A. That is right.

Q. So it doesn't have the background of that colored dye. But we can see where it would go if it were put back in. You can certainly see that there is a difference in color between this section of the wick, the middle section, and the red portion that is dyed, can't you?

A. Oh, yes, this is slightly dyed. But in burning the wax would go right into the wick and burn it.

Q. But in this condition there is no substantial amount of dye in that wick? A. Slightly.

The Court: There is some discoloration of the wick in that, is there not?

Mr. Lyon: I will show it to the court.

The Court: I was looking at it a minute ago.

(Testimony of Lester F. Wilson.)

Some of it is white and some of it is not.

(The exhibit referred to was passed to the court.)

The Court: Counsel, I am looking at this piece of string that you call a wick and on the under side of it, the portion that is in the blue or green, if that is green, is colored [65] to match it and in the portion that is in the red, or shade of red, or orange, or pink, or maroon, or mauve, or whatever shade of red it is, is also slightly discolored to match the color in which it lays.

Mr. Lyon: We submit that that is some colored wax adhering to the wick, your Honor, and in fact that the wick itself does not contain any dye.

The Court: That will go back in the box.

The Witness: I will put it away. [66]

Q. (By Mr. Lyon): Mr. Wilson, did you bring a lawsuit against the Victrylite Candle Company?

A. Yes.

Q. What is the status of that lawsuit?

A. We——

The Court: Which one? There is a record in evidence where judgment is entered.

Mr. Lyon: I am not referring to that lawsuit, please. I am referring to a lawsuit after you entered into the contract with Victrylite. Did you thereafter have occasion to sue Victrylite?

The Witness: Yes.

Q. (By Mr. Lyon): What for?

A. Non-payament of royalties.

Q. What is the status of that lawsuit?

(Testimony of Lester F. Wilson.)

A. It is pending in the federal court.

The Court: Here?

The Witness: No. In Milwaukee.

Q. (By Mr. Lyon): This tabulation of royalties, after the filing of that lawsuit did Victrylite continue to pay royalties?

A. Yes, according to your record there.

Q. What is the basis of your suit?

A. Not paying full royalties. Paying enough royalties just to keep the contract alive. [67]

Q. Then this summary, Exhibit 6, does not accurately reflect the sales of colored drip candles by Victrylite Company; is that correct?

A. If I thought that was correct, after '52, I would not have brought suit.

Q. Mr. Wilson, is there any teaching in your patent of how a person seeking to make a candle in accordance with the disclosure of your patent should make sure that it would drip?

A. I think any candle maker knows how to make a candle drip, more or less.

Q. I didn't ask you that, sir. I asked you if there is any disclosure in your patent as to how to make it drip.

A. No, not that I know of.

Q. During the pendency of your patent before the Patent Office, did you conduct any experiments in order to inform your counsel as to whether or not metallic salts in the wick of a candle would color the drippings? A. No.

Q. Did you make any statements to your counsel

(Testimony of Lester F. Wilson.)

as to whether or not metallic salts in the wick of a candle would color the drippings? A. No.

Q. Did you know whether or not metallic salts in the wick of a candle would color the drippings?

A. No. [67]

Q. Do you know today whether copper acetate in the wick of a candle will color the drippings?

A. I am not a chemist.

Q. I am not either, but I know the answer to that question. I am asking you, do you know?

A. I don't know—I wouldn't know unless I had a container marked "copper acetate"—I don't know what copper acetate is—and tried it. If it was properly labeled and I tried it and knew it at the time.

I have heard a lot of these names, but I don't know one from the other.

Q. In your Magi-Colored candles, do you use a green dye? A. Yes.

Q. What do you use to make the green dye?

A. I use a dye put out by Ciba Company. Mr. White, I believe, has a sample of that. And it is called, if I remember right, Candle Emerald Green.

Q. Do you know the composition of that dye?

A. It is a candle dye. As I say, I am not a chemist, I don't know the composition of any of them.

Mr. Lyon: I have no further questions.

The Court: Redirect?

Mr. White: Very briefly, your Honor.

(Testimony of Lester F. Wilson.)

Redirect Examination

Q. (By Mr. White): In connection with this little slip to which counsel has referred, now identified as Exhibit 4-D, when these candles are placed in a holder, do they burn down into the holder?

A. The original candle will if it is left lighted.

Q. So in accordance with the slip, once it is burned down into the holder and you have a hole to put another candle in, you may do so?

A. Yes.

Mr. White: I believe that is all, Mr. Wilson.

The Court: Step down.

Next witness.

Mr. White: At this time, your Honor, I would like to read into the record certain interrogatories and their answers.

The Court: Very well.

Mr. White: I refer to Defendant's Answers to Interrogatories. There were 20 interrogatories, all to which were given answers. At this time there are certain interrogatories and their answers which I should like to read.

The first is Question No. 1: "Concerning the allegations in paragraph 8 of the Answer, state whether to defendant's knowledge a candle defined as follows: [70]

"A drip candle having a wax body and containing within its interior different wax-soluble dyes at different locations longitudinally of the body, the different dyes being concealed within the candle body and being undissolved in any substantial

portion of the body wax before the candle is burned, the dyes dissolving in the said portion of the body wax as the candle burns with resultant formation of a composite of different colored drippings as the candle progressively burns.

“A. Had prior to March 13, 1945, been manufactured in the United States, other than by plaintiff, and if so, state:

“1. The name and address of the manufacture;

“2. The time of manufacture; and

“3. The manufacturer’s identification of all such candles.

“B. Had prior to March 13, 1945, been sold in the United States, other than by plaintiff, and if so, state:

“1. The name and address of the seller;

“2. The time of sale; and

“3. The seller’s identification of all such candles.

“Answer: A. No. [71]

“Answer: B. No.

“Question Two:

“Concerning the allegations in paragraph 8 of the Answer, state whether to defendant’s knowledge, a wax body candle containing and concealed within its interior before burning, different wax coloring materials at different longitudinal locations in the candle body and undissolved in a substantial portion of the body wax, in a manner such that upon burning the candle forms a composite of different colored drippings which become colored by said wax coloring materials.

“A. Had prior to March 13, 1945, been manu-

factured in the United States, other than by plaintiff, and is so, state:

“1. The name and address of the manufacturer;

“2. The time of manufacture; and

“3. The manufacturer’s identification of all such candles.

“B. Had prior to March 13, 1945, been sold in the United States, other than by plaintiff, and if so, state:

“1. The name and address of the seller;

“2. The time of the sale; and

“3. The seller’s identification of all such candles. [72]

“Answer: A. No.

“Answer: B. No.” [73]

Going now to question 5:

“(a) Has defendant within six years prior to the filing of the complaint herein, manufactured and sold candles as defined in Interrogatory I?

“(b) If the answer is in the affirmative, state fully with respect to all different candles so made and sold, the composition of each and every part of and material contained in the candles, and the procedure of making them.

“(c) And state further if the answer to 5(a) above is in the affirmative, the times throughout which all specified compositions were manufactured and sold.

“Answer: The answer to Interrogatory X.

“Question 6: (a) Has defendant within six years prior to the filing of the complaint herein,

manufactured and sold candles as defined in Interrogatory II?"

The Court: What is the answer to Interrogatory V? Do you have to lead up to that?

Mr. White: I propose, your Honor, to come to Interrogatory No. X and we will find in that the defendant's answer to all of this.

The Court: Very well.

Mr. White: Continuing: [74]

"(b) If the answer is in the affirmative state fully with respect to all different candles so made and sold, the composition of each and every part of and material contained in the candles and the procedure of making them.

"(c) State further if the answer to 6(a) above is in the affirmative, the times throughout which all specified compositions were manufactured and sold.

"Answer: See answer to Interrogatory X.

"Question 7: If defendant refers in its answer to Interrogatory V, to any candle of its manufacture and sale, state whether defendant knew of any manufacture, use, sale, or description of a similar multiple color drip candle, (other than those manufactured or sold or described by plaintiff herein) prior to defendant's manufacture and sale thereof, and if so, identify fully the prior manufacturer, user, seller of source of description.

"Answer: No.

"Question 8: If defendant refers in its answer to Interrogatory VI, to any candle of its manufacture and sale, state whether defendant knew of

any manufacture, use, sale or description of a[75] similar multiple-color drip candle (other than those manufactured or sold or described by plaintiff herein) prior to defendant's manufacture and sale thereof, and if so, identify fully the prior manufacturer, user, seller of source of description.

"Answer: No.

"Question 9: (a) Was defendant making and selling on or about April 26, 1950, a multiple color drip candle under the name 'Make-a-Rainbow candles'?

"(b) Did defendant make or sell prior to its manufacture and sale of 'Make-a-Rainbow candles' any similar candle capable of forming rainbow color combinations or drippings, and if so specifically identify such similar candle.

"(c) Did defendant, its agents, officers or employees have knowledge of plaintiff's 'Magi-Color' drip candle prior to defendant's manufacture or sale of its 'Make-a-Rainbow candles'?

"Answer: (a) Yes.

"(b) Yes; Emkay 1411.

"(c) No."

Mr. Lyon: Your Honor please, I offer at this time for identification an Emkay 1411 candle as Defendant's Exhibit—I guess it will be Q.

The Clerk: Exhibit P. [76]

The Court: Any objection?

Mr. White: No.

May I see that candle, please?

(The exhibit referred to was marked Defendant's Exhibit P for identification.)

Mr. White: No objection to its being admitted, your Honor.

Mr. Lyon: Then I offer it in evidence .

The Court: It is admitted.

(The exhibit previously marked Defendant's Exhibit P for identification was received in evidence.)

Mr. White: I wish to question Mr. Muench concerning it, however.

Do you happen to have an extra one of those, counsel?

Mr. Lyon: I have a couple of them back at the office. I may have an extra one here.

Yes, here is another one made of a different color.

(The exhibit referred to was passed to counsel.)

Mr. Lyon: Of course the one I gave you there is a different set of colors than the one that is in evidence.

Mr. White: But they were made the same way?

Mr. Lyon: Yes.

Mr. White: And differ only in coloring?

Mr. Lyon: Yes.

Mr. White: Now we come to Question 10 and its answer. [77]

"Question 10: (a) Is the following a true statement concerning defendant's activities up to August 1, 1953?

"From May 17, 1949, to and including September 5, 1952, Muench Kruezer Candle Company

manufactured and sold under the trade-mark 'Make-a-Rainbow' candles which were provided with cotton wicks in which were incorporated various types of aniline dyes disposed successively in different portions of the wick so that on burning the candle presented successively different colored drippings.

"This candle was discontinued September 5, 1952, and all models have been disposed of so that none is available from the defendant for production. Since September 5, 1952, defendant's candles have been manufactured by first dipping a wick to form a thin taper of substantially one-fourth inch thickness upon which there is then painted in successive spaced portions molten wax containing aniline dyes of different colors. The candle is then finished by further dipping to produce the finished candle, having the colored wax portions covered by uncolored wax.

"The percentage of aniline dye to wax in the material which is painted upon the thin taper [78] is within the range of percentage of due to wax customarily used by defendant and other candle makers in making solid-colored candles. These candles have been sold under the trade-mark 'Make-a-Rainbow' and were recently under the trade-mark 'Color Fall.' Such candles have been sold from September 5, 1952, to date (i.e. August 1953).

"(b) If the foregoing quoted statement is incorrect in any respect please state wherein it requires correction.

"(c) If defendant has manufactured or sold

subsequent to August 1, 1953, any candles of the same type as its 'Make-a-Rainbow' and 'Color Fall' candles but of different compositions, describe fully all such different compositions and the procedure of making them into candles, and give the name under which they have been sold.

"Answer: (a) Yes, with the explanation set forth in answer to Interrogatory 10(b).

"(b) At no time did the defendant manufacture a candle in which aniline dyes were directly incorporated in the wick. Defendant's practice, in accordance with the ancient 'muetter farben' (mother color) practice, was to use a colored wax which, in the period prior to 1952, was applied [79] directly to the wick and since said period has been applied to a thin taper or core. The statement in Interrogatory 10 concerning the range of percentage of dye to wax is really meaningless in that this percentage varies in accordance with the strength of the particular batch of dye, the type of the dye and the overall color desired. Mother color is, however, wax incorporating a rather concentrated dye.

"The body of the candles is a mixture of paraffine and stearic acid. The wick is braided cotton nine-ply.

"(c) Defendant has made no changes in its colored drip candles since August 1, 1953."

Now going over to Question 16. The others, your Honor, I am not reading into the record at this time because I think they will be better under-

standable in connection with what I expect to be the showings concerning prior art by defendant.

“Question 16: (a) To defendant’s knowledge have candles manufactured as described in any of the patents referred to in Interrogatory 15, been sold in the market in the United States or any other country prior to 1945.

“(b) If the answer to the foregoing is in [80] the affirmative, state the name and address of all such manufacturers or sellers known to defendant.

“Answer: (a) No.

“(b) No answer required.

* * * * *

“Question 20: Describe and identify any candles (other than those manufactured by plaintiff) publicly sold on any market prior to defendant’s ‘Make-a-Rainbow’ candle which upon burning produced similarly, in an unpredictable sequence by reason of the concealment of different coloring materials in the candle, a succession of distinctly and differently colored drippings resulting from the melting of at least a portion of the candle body wax and its acquisition of successively different colors which said portion of the wax did not have before melting.

“Answer: Defendant has no knowledge of any such candles.”

Now I should like to question Mr. Muench as an adverse witness in connection with some of these deposition answers, if you please.

‘The Court: Come forward. [81]

NORBERT C. H. MUENCH

called as witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Norbert C. H. Muench.

The Clerk: Spell your first name.

The Witness: N-o-r-b-e-r-t.

The Clerk: And you last name.

The Witness: M-u-e-n-c-h.

The Clerk: Your address, please?

The Witness: Street address or just Syracuse, New York?

The Court: Your street address.

The Witness: 208 Twin Hills Drive, Syracuse, New York.

Direct Examination

Q. (By Mr. White): Mr. Muench, what is your relation with the defendant Muench-Kruezer Corporation in this action?

A. I am vice president of the corporation.

Q. How long have you been with the company?

A. Since its inception when we took over the Knapp Candle and Wax Company in 1925.

Q. When you say "we" you mean?

A. My brother and I and our families.

Q. How does the corporation happen to have the name Muench-Kruzer? [82]

A. Well, Muench is our surname and Kruezer, as we pronounce it but Kruezer as it is generally used, and that is where Emkay comes from, be-

(Testimony of Norbert C. H. Muench.)

cause it was more easily read. Mrs. Kruezer was my aunt.

Q. The predecessor of the present corporation was in the candle business how long, would you say?

A. I would say since 1910. You mean the Knapp Candle and Wax Company?

Q. Right. A. Yes.

Q. And the defendant corporation has continued that business up to date?

A. That is correct.

Q. Is not the defendant in this action one of the largest candle manufacturers in the United States?

A. Well, we would possibly be rated around either fourth or fifth, possibly, as a pure candle company.

If you eliminate companies like Standard Oil of Indiana, which is a big oil company too.

Q. But among those companies engaged purely in the candle business, Muench-Kruezer rates what place in size, would you say?

A. I would say around fourth, third or fourth. I can't say exactly.

Q. Do other candle manufacturers have [83] ownership in Muench-Kruezer Corporation?

A. No, sir.

Q. What facilities, plant and personnel, Mr. Muench, does the defendant maintain at Syracuse?

A. You mean our company?

Q. Yes.

A. We have a manufacturing plant there con-

(Testimony of Norbert C. H. Muench.)

sisting of a company that makes molded candles, handmade candles, beeswax candles—in fact, all types of candles.

Q. How many people do you have?

A. In the neighborhood of 200.

Q. Do you have a laboratory?

A. A partime laboratory. [84]

Q. Is experimentation on candles conducted in that laboratory? A. Will you repeat that?

Q. Experimentation on candles conducted in that laboratory? A. Yes.

Q. What has been your personal experience in the making, actual making of candles?

A. Well, I started in 1910 and worked through the different departments from the beginning, up.

Q. You experienced all phases of the manufacturing end of the business?

A. Yes, sir, excepting, I might add with Mr. Wilson, I am not a chemist, either.

Q. Generally, what different kinds of candles does your company manufacture and sell?

A. We manufacture beeswax candles, stearic acid candles, paraffine candles, novelty candles, and anything like that in the candle line, commercial candles and church candles.

The Court: Do you make tallow candles any more?

The Witness: No, sir. They are known today as stearic acid candles, which is the purification of tallow into a waxy substance known as stearic acid.

Q. (By Mr. White): Do you make some [85]

(Testimony of Norbert C. H. Muench.)

candles that drip little and some candles that drip profusely? Is that not right?

A. Of course, the draft a good deal controls it, as was shown here with these candles. And also, incidentally, the size of the wick that is contained in those. These candles particularly made to drip are made with a very small wick.

Q. But your company has been making both types? This would be what you might call a profusely dripping candle, is that not right?

A. Yes, sir.

Q. And your company manufactures those which drip little, and the candles which drip a good deal; is that not right?

A. Well, you might say that, yes.

The Court: The larger the wick, the less drip?

The Witness: No. It is controlled a good deal by the diameter of the candle as to the size of the wick. For instance, a paschal candle that is used at Easter Time in the Roman and Greek Catholic Churches may be a candle as large as three inches in diameter, and then it has a very large wick.

Incidentally, those type of candles, and the candles that are used primarily in church, have what we call a candle follower, because churches are usually drafty and they have a tendency to make the candles drip, and despite the fact that [86] we try to overcome that, the churches use what is known as a candle follower, which is made of either metal or glass, and it holds the drip of the candle inside of the cup of the candle.

(Testimony of Norbert C. H. Muench.)

Q. (By Mr. White): How long have you, as a candle manufacturer, known what makes candles drip?

A. Usually atmospheric conditions.

Q. How long have you, Mr. Muench, as a candle manufacturer, known what makes candles drip?

A. Possibly from the beginning of my inception in the candle business where I gradually learned the details of it.

Q. And that is general knowledge in the candle industry, isn't it, among candle manufacturers?

A. That is right.

Q. When did your company first make a Rainbow candle?

A. We experimented in 1948 with a multiple drip candle, but we brought it out in the market in the spring of 1949.

Q. You say you experimented in 1948 with a multiple drip candle?

A. Yes, sir.

Q. How did you happen to so experiment?

A. How did I what?

Q. Let me first ask, when you say "we"; who experimented?

A. I mean our company, Muench Kruezer [87]

Q. You were acquainted with the experimentations, were you?

A. Yes.

Q. Did you direct them?

A. Partially, through our superintendent, who carried on the intimate detail of it.

Q. You place that time, the commencement of the experimentation, as being about when?

(Testimony of Norbert C. H. Muench.)

A. About 1948. I know that, it was in 1948.

Q. That, to the best of your knowledge, was the time of the first endeavor by the defendant here to produce such a candle?

A. You mean with a multiple drip? We had produced, of course, single drips by using this Star Pillar candle No. 228, which we made originally with a red and a yellow and a green, depending on the time of the year. The red and the green for the fall season, and the yellow and the light green for the spring season.

Q. But——

A. They were supposed to drip that color.

Q. 1949 marks the first time when your company undertook to experiment towards the manufacture of a candle such as——

A. In 1948 we were experimenting. In 1949, the spring, we started to market Make-a-Rainbow candle. [88]

Q. That was the first experimentation toward the making of a candle like Exhibit 12, Plaintiff's Exhibit 12?

A. Multiple drip, in 1948.

The Court: We will have the afternoon recess.

(Recess taken.)

Q. (By Mr. White): Mr. Muench, do you know why your company happened to enter into the experimentation in 1948 for the making of a multi-color drip candle?

A. Mr. White, with the novelty line, we are constantly entering into experiments. We carry on ex-

(Testimony of Norbert C. H. Muench.)

periments in different forms, shapes, and manners. In fact, the very word "novelty" candles means a change, and we are constantly changing the designs, and the usages of candles.

Incidentally, this candle is a novelty, too. That may explain some of the dropping off of the sale. We have those same experiences, too.

Q. At this time, 1948, approximately how many salesmen did your company have in the field?

A. Do you mean in the novelty line?

Q. Right.

The Court: Candle line.

The Witness: In the candle line we have two sets of salesmen, those that sell for the churches, which run in the neighborhood of between 15 and 20, and then with the novelty line we only have two or three that sell; but we sell, market [89] through outlets, through men in the field who handle their own company and handle maybe four or five lines.

The Court? Brokers?

The Witness: Brokers, like.

Q. (By Mr. White): Has it been the practice of your company to keep abreast of the new items on the market? A. Yes, of course. [90]

Q. As presented by your competitors?

A. You see, we not only try to keep them but certain accessories that go with it. For instance, in the last three years we also had wrought iron line and things like that that complement the candle, candle sticks, ash trays, and things like that, that we many times add in with a combination.

(Testimony of Norbert C. H. Muench.)

Q. Perhaps I didn't make my question clear.

In 1948 was it not the practice of your company to acquaint itself with the merchandise in the candle field being sold by your competitors?

A. We naturally run into these different lines, and we may be a little egotistical, but I like to feel that we lead the line rather than follow anybody.

Q. That didn't happen in this case, though, did it?

A. Well, I don't know about this.

The Court: That is argumentative, counsel.

Mr. White: I am sorry, your Honor.

Q. Who first authorized and directed the experimentation leading to the Make-a-Rainbow candle?

A. Mr. White, most of these ideas come naturally, and I can't answer that as to who was the first one who authorized it. I certainly know that with this Edwards deal that you saw there, we knew nothing about that.

Q. Who would you say in your organization, if such [91] is the case, originated your Make-a-Rainbow candle?

A. I can't answer that definitely. It seemed to be a development rather than somebody originating it, and I couldn't say.

The Court: Do you know the Edwards Company in Syracuse?

The Witness: Yes, sir. They are a large department store. They handle four or five different lines of candles.

Q. (By Mr. White): Do they handle your candles?

(Testimony of Norbert C. H. Muench.)

A. Some of them. It is sort of an on and off again arrangement.

Q. Do your salesmen call on them?

A. Yes, certainly, at different times.

You know, a department store many times you will have two or three departments that handle candles. Now the china department many times handles them and sometimes the lamp department. Sometimes there is competitive lines in the different departments.

Q. But your company was then selling other novelty candles, was it not? A. Yes.

Q. And selling to that retail outlet?

A. Sometimes, yes; sometimes, no. Sometimes it was one of the other companies who were in there rather than us. [92]

Q. Mr. Muench, when did you personally first have knowledge of the Wilson patent in suit here?

A. The Wilson candle, drip candle?

The Court: No, the patent.

Q. (By Mr. White): The Wilson patent?

A. The patent?

Q. Yes.

A. It was in September of 1949, a company down at Long Beach—I think maybe Mr. Wilson knows—I think it is known as I. S. & S., and they wrote us a letter asking about it because our Make-a-Rainbow candle was on the market. And I wrote them and said that I hadn't heard of it, and asked them to send me a copy of the patent, if possible,

(Testimony of Norbert C. H. Muench.)

which they did, which I turned over to our patent attorney at the time.

Q. Do you have available that correspondence?

A. Yes, I have.

Q. Would you furnish me with copies of it, please?

The Court: Do you have it here?

Mr. Lyon: I think the witness has it.

The Witness: I have it.

Mr. White: Correspondence which will include the inquiry to you or your company concerning the accusation of an infringement made by Mr. Wilson against the Long Beach [93] company.

The Witness: I haven't that; all I have is the letter that this gentleman wrote.

Mr. White: At approximately what time was that, Mr. Muench?

The Witness: I believe it was in September 1949.

(Exhibiting document to counsel.) [94]

Mr. White: Counsel has handed me——

The Court: Do you service any of the accounts yourself, your accounts?

The Witness: Personally?

The Court: Yes.

The Witness: No, sir.

The Court: You don't go on the road?

The Witness: No, sir.

Q. (By Mr. White): Counsel has handed me clipped together three letters, and a special delivery envelope, the envelope postmarked September 19, 1949. The first letter in order of time is a letter

(Testimony of Norbert C. H. Muench.)

under the heading I. S. & S. Products Coordinators, 1662 West 15th Street, Long Beach 13, California. This letter, air mail special delivery, directed to Emkay Candles, Division of Muench Kruezer Candle Company, Syracuse 1, New York, attention General Manager.

"Dear Sir:

"Referring to your Make-a-Rainbow candle which we saw advertised in your catalog, page 19, we wish to advise as follows:

"We are a distributor of houseware and gift ware merchandise, and candles are one of our lines. We were selling a candle similar to your above-mentioned one, but we were notified by the Orange Lite Candle Company of San Gabriel, [95] California, that a patent had been issued to their Mr. Wilson on the candle, and we were requested to discontinue the sale of same.

"You have undoubtedly checked the validity of this patent, and if so, we would like very much your advising us the status of same, or your findings with reference to its validity.

"Your reply will be greatly appreciated.

"Yours very sincerely,

"I. S. & S. Products,

"Carl T. Bolen, General Manager."

Your reply, Mr. Muench, next, dated September 23, 1949, air mail.

"I. S. & S. Products

"Attention: Mr. Carl T. Bolen

"Long Beach, California

(Testimony of Norbert C. H. Muench.)

"Dear Mr. Bolen:

"We have your letter of September 19 in regard to a patent allegedly held by Orange Lite Candle Company of San Gabriel, California, in reference to multicolor drip candles. We are not aware of any patent on this type of candle and therefore cannot help you. If you have a copy of this patent, we would appreciate your sending it to us. [96]

"Awaiting your reply, we are,

"Yours very truly,

"Muench Kruezer Candle Company

"By Norbert C. H. Muench."

The third letter under the letterhead of I. S. & S. Products, dated September 28, 1949, directed to Muench Kruezer Candle Company, attention Mr. Norbert C. H. Muench.

"Dear Mr. Muench:

"Thank you for your letter of the 23rd regarding the color drip candles.

"Enclosed herewith is a copy of the patent Mr. Wilson sent to us with his request for us to discontinue the sale of the color drip candles.

"We would appreciate your examining the patent and returning same to us with your comments and/or opinion of the validity of the patent.

"Your prompt reply will be appreciated.

"Yours very sincerely,

"I. S. & S. Products,

"Carl T. Bolen, General Manager."

Did you reply to that, Mr. Muench?

A. I turned the thing over to our patent attor-

(Testimony of Norbert C. H. Muench.)

ney, and you know how patent attorneys are, Mr. White. I never got around to answering that.

Q. I will accept the implications. [97]

The Court: You mean you don't know what he did with it?

The Witness: I know I didn't get a prompt reply.

Q. (By Mr. White): Do you know actually what he did about it?

A. Well, he investigated, and I think he made a search at that time, which took quite some time.

The Court: Did he give you a written opinion as to whether or not the patent was valid?

The Witness: He wrote in regard to the Fredericks patent, and he was investigating that patent, and from his point of view the Wilson patent was not valid due to this prior art.

The Court: That is what he advised you?

The Witness: Well, that is what the development was at that time.

The Court: Did he advise you of that?

The Witness: Yes, I think he did advise us of that, that it was prior art.

The Court: By a letter?

The Witness: No. We usually telephoned a good deal on that.

Q. (By Mr. White): Who was that, Mr. Muench?

A. Frederick Bodet, who has died since.

Q. Do you happen to know what I. S. & S. Products, Mr. Carl T. Bolen, did in response to Mr. Wilson's charge of [98] infringement?

(Testimony of Norbert C. H. Muench.)

A. No. That is the only correspondence I have had with him. I never heard from him since.

Q. But you had knowledge of the Wilson patent——

The Court: I can tell it has been asked and answered the way you are starting out now. "You had knowledge of it on the date of those letters?" Of course he had. He just got through saying that.

Mr. White: Thank you, your Honor.

Mr. Lyon: Do you intend to offer them in evidence?

Mr. White: I have read them into the record.

Q. (By Mr. White): Mr. Muench, when did the Make-a-Rainbow candle actually come out on the market?

A. It was in the spring around May of 1949 when we first started to sell them.

Q. As I recall, your experimentation led to the making of that candle by——

The Court: Which one is that?

Mr. White: The manufacture——

The Court: 13?

Mr. White: Yes. Or this is probably a closer resemblance, would you not say? "This" being Plaintiff's Exhibit 12.

The Witness: Yes.

The Court: Let me see it. [99]

The Witness: That was the first one we got out.

The Court: Exhibit 12 was the first one you got out, and you sold that in the spring of 1949?

The Witness: The spring of 1949.

Q. (By Mr. White): Is it not true, Mr. Muench,

(Testimony of Norbert C. H. Muench.)

that that candle did not come along until later? Has it not been stated that you destroyed all the samples of the first candle? And we do not represent those to be the first ones.

A. I see what you mean. This was the core candle, as you say, and the one we put the colored wax or the muetter farben on the wick was the first one that we produced and sold.

The Court: That is the one you discontinued?

The Witness: Yes. September 5, 1952.

The Court: How many of those did you sell, do you know?

The Witness: Not too many. I don't remember exactly, though.

The Court: I don't know how many "too many" is. A million?

The Witness: No, no. Taking a tenth of that, I think it was less than a tenth of that, maybe 100,000.

Q. (By Mr. White): They were manufactured and distributed generally throughout the United States, were they not?

A. Yes, sir. [100]

Q. As you manufactured that candle, dye dissolved in wax?

The Court: Wait a minute. As he manufactured it—do you mean during the time that he was manufacturing it?

Mr. White: No. I am getting at the way the candle was made, your Honor.

Q. (By Mr. White): Was it not made by applying directly to a candle wax——

(Testimony of Norbert C. H. Muench.)

Mr. Lyon: Candle wick, do you mean?

Q. (By Mr. White): Candle wick, thank you, different dye wax solutions at successive locations along the wick?

A. This mother color that we used at that time—you see that has a background prior to this. It goes way back to the years—

The Court: His point was whether or not you put it on the wick.

The Witness: This colored wax we put on the wick.

The Court: And that has been admitted in your answers.

Q. (By Mr. White): Was it not done essentially in this manner, and I read from column 3, lines 30 to 33 of the Wilson patent:

“By incorporating the dye in a relatively high melting point wax and applying the resulting melted mixture to the wick, the dye is effectively confined upon solidification of the wax.” [101]

That is substantially what happened in the manufacture of your first Make-a-Rainbow candle, is it not?

A. Yes, with the colored wax applied. [102]

Q. Then you dip those candles and build them up to the desired diameter?

A. That is right.

Q. I will ask you to confirm, if you will, Mr. Muench, that Plaintiff's Exhibit 10 is a photostat of my letter of April 26, 1950, to you, your company, charging infringement of the patent in suit—

(Testimony of Norbert C. H. Muench.)

Mr. Lyon: So stipulated.

Q. (By Mr. White): —and that Exhibit 11 is your reply dated May 3, 1950, acknowledging receipt of my letter and stating that the matter was being referred.

The Court: It has been so stipulated. Counsel has stipulated.

The Witness: That is my signature.

Mr. White: Thank you.

The Court: They are already in evidence anyhow.

Q. (By Mr. White): Referring now to Plaintiff's Exhibit 16, which is your catalog No. 83, approximately how long has that catalog, containing pages corresponding to pages 3 and the rear page, the back side of it, been in publication?

A. I think that was copyrighted in 1953. It is marked on there.

Q. Did you publish a similar showing of the [103] Make-a-Rainbow candle prior to that?

A. I am not sure whether it is in our catalog. I imagine it might be, but I am not sure whether it was in the 1952 catalog.

Mr. Lyon: Mr. White, for your information we will offer copies of each of the Emkay catalogs from 1940 to date as part of our case.

Mr. White: Thank you.

Q. One further question, Mr. Muench. I don't want to try to anticipate the defense, but inasmuch as you mentioned during the course of your testi-

(Testimony of Norbert C. H. Muench.)

mony this star pillar candle here, Defendant's Exhibit F, may I inquire, is that a stock candle?

A. Yes, sir.

Q. You took that out of stock?

A. That is our No. 228.

Q. And as a stock candle it shows at its end a red core. A. A red core.

Q. So anyone purchasing and undertaking to use the candle will know exactly what color it drips, is that not right? A. That is right.

Mr. White: That is all. Thank you.

The Court: Step down. [104]

(Witness excused.)

Mr. White: That concludes the presentation of the plaintiff's case, your Honor.

The Court: The plaintiff rests?

Mr. White: Yes, your Honor.

The Court: Very well.

What is this Color Fountain candle on page 21, does that have anything to do with yours?

Mr. Muench: The Color Fountain is not a multi-drip candle, your Honor, it is a single drip.

The Court: Very well.

Mr. Lyon: At this time, your Honor, I offer as defendant's Exhibit B a stipulation between myself and counsel as to the use in the prior art of aniline dyes and metallic salts for the coloring of candles, and also as to a true and correct translation of the German patent to Hausamann, No. 157,209, one of the patents relied upon in the answer.

(The document referred to was received in evidence and marked Defendant's Exhibit B.)

[See Book of Exhibits.]

Mr. Lyon: As Defendant's Exhibit C we offer a certified copy, certified by the Patent Office, of Emkay Catalog No. 50, with certification that a copy of such publication was received in Division 30 of the Patent Office January 14, 1943.

I call your Honor's particular attention to the matter [105] appearing under the 228, referring to the star pillar candle.

The Court: Was this filed in the Patent Office in this proceeding?

Mr. Lyon: No, your Honor. The Patent Office maintains a library and that is a certificate to the effect that that publication was received in their library and was available to the patent examiners as of that date. [106]

You will note that it refers to a Star Pillar candle.

The Court: Christmas red or Christmas green, also white with red center. The latter candle drips red colored wax over the white outer shell, giving a translucent glow. Individually packaged, base not included, each \$1.00.

Mr. Lyon: At the same time I offer——

The Clerk: Admitted, your Honor?

The Court: Admitted.

The Clerk: That is B and C.

The Court: By the way, the stipulation, Exhibit B, is approved by the court, and is admitted in evidence.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit C.)

Mr. Lyon: Now we offer as Defendant's Exhibit F the Star Pillar candle.

The Court: The Star Pillar candle with red center, is that right?

Mr. Lyon: That is right. We will burn that candle tomorrow.

The Clerk: Admitted?

The Court: Admitted.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit F.)

Mr. Lyon: As Defendant's Exhibit A, we offer the prior art, a book of prior art, if it hasn't already been admitted. [107]

The Clerk: It has been admitted.

Mr. White: A is the prior art?

Mr. Lyon: That is right.

At this time, your Honor, I would like to call your attention to——

The Court: I read Mr. White's brief and I have read the opinion of the Court of Appeals during the noon recess.

Mr. Lyon: I would like to call your Honor's attention particularly to paper No. 6 in the file wrapper.

The Court: What page?

Mr. Lyon: Page 16, 15——

The Court: 15 and 16?

Mr. Lyon: It actually begins on 13.

The Court: Los Angeles, California, March 11th, is that it?

Mr. Lyon: That is right. That is what I want to refer to.

The Court: Commissioner of Patents, Washington, D. C.?

Mr. Lyon: Yes, your Honor.

I want to call your Honor's attention particularly to claims 15, 16, 17 and 18 as they appear in that amendment.

The Court: Let me see, 15, 16 and 17 were disallowed?

Mr. Lyon: That is correct.

The Court: And 18, 19, 20, 21, 22, and 23 were finally allowed as claims 1, 2, 3, 4, and 5, and I correct? [108]

Mr. Lyon: That is right.

And you will note that with respect to claim 18——

The Court: Well, now, you said you wanted to call my attention to claim 15, so let me give my attention to claim 15.

Mr. Lyon: All right.

The Court: Yes?

Mr. Lyon: It is my contention that those claims, claims 15, 16, 17 and 18, prior to the amendment which appears in claim 18 in ink, those claims are claims which have the scope which Mr. White is now seeking to argue for the claims as allowed, and that those claims——

The Court: I wonder if I might make this observation, subject to correction by counsel.

In reading the patent in suit, claims 2, 3, 4 and 5

all relate to the application of the coloring material to the wick.

Mr. Lyon: That is right.

The Court: Claim No. 1 is the only one that is not so limited. Am I correct?

Mr. White: That is correct, your Honor.

Mr. Lyon: And claim No. 1 says that the dye is normally undissolved in the wax of said body, and that is the amendment that was added to the claim after the claim was rejected in its original form, and by elementary law of [109] file wrapper estoppel, that is the gist of the claim from then on in, it is thing that got it allowed.

So if we have a dye normally dissolved by the wax in the body we cannot infringe that claim. To hold otherwise would be to give him the scope which the claim would have had prior to the insertion, or the scope of claims 15, 16 and 17, which are silent as to where the dye is placed in the candle.

So we have in this case a file wrapper estoppel which, in my opinion, clearly frees current production from any claim of infringement of this patent.

But I wanted to call those particular things in the file wrapper to your attention.

The Court: Or stated in other words, your position is that the candles which are manufactured by the defendant, of which the Star Pillar is an example, I mean with one colored casing and another colored interior, does not infringe claim 1.

Mr. Lyon: Oh, no, that is not my position at all. It has nothing to do with the Star Pillar candle. The Star Pillar candle, as you can see from the cat-

alog, has been manufactured by the defendant since 1940.

The Court: Why do you want to burn it then?

Mr. Lyon: It is prior art.

The Court: It only has one color. [110]

Mr. Lyon: It only has one color.

The Court: And this has to do with multicolor, all these.

Mr. Lyon: That is right.

The Court: Well, then, what candle is it—it is this No. 13?

Mr. Lyon: That is right.

The Court: Candle No. 13?

Mr. Lyon: Yes, your Honor.

The Court: That is what you call your current production?

Mr. Lyon: That is correct, since September 5, 1952, when we ceased applying the muetter farben to the wick.

I am ready to proceed but I see it is now 4:00 o'clock. I can put Mr. Muench on and start the defendant's case.

The Court: Are you hinting that maybe the court should adjourn?

Mr. Lyon: Well, I will proceed if you like.

The Court: We will recess until 10:00 o'clock tomorrow morning.

How many witnesses will you have?

Mr. Lyon: Mr. Muench only.

The Court: Without prejudicing your right to

defense or the plaintiff's rights here, are not the issues narrowed down as to whether or not there is an infringement of claim [111] 1, whether claim 1 is valid and there is an infringement of it? Is that not the issue? The defendant admits the rest of it is infringed. You admit the rest of them are infringed, do you not?

Mr. Lyon: They were infringed prior to 1952, if valid.

Mr. White: As I understand it, the defendant will deny validity of all claims in the patent. It admits infringement of the patent through the first manufacture of the Make-a-Rainbow candle, and it is now denying infringement on the basis of, what shall we say, its current production.

The Court: Very well.

Recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Wednesday, March 21, 1956.)

The Court: Ex parte?

The Clerk: No, your Honor.

The Court: Proceed.

Mr. Lyon: Mr. Muench.

The Court: You were sworn yesterday.

Mr. Muench: Yes.

The Court: You pronounced your name a little differently than we have been pronouncing it. What is the correct name?

Mr. Muench: It rhymes with lynch.

NORBERT C. H. MUENCH

called as witness herein by and on behalf of the defendants, having been heretofore duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Lyon): Mr. Muench, will you briefly sketch your training and schooling with respect to the art of candle making?

A. Well, I began as a comparatively young man in 1910, working up through the various departments of the company in the making of all kinds of candles.

Q. This was with the Will & Baumer Company?

A. Will & Baumer Company in 1910, and worked through the various departments, and then was made an assistant [114] superintendent, and then superintendent. In 1925 my brother Alexis and I withdrew from the Will & Baumer Company and our family purchased the controlling interest of the Knapp Candle Company and we then changed the name to Muench-Kreuzer Candle Company, and we have been operating over there since.

We have no active connection with the Will & Baumer Company at all. In fact, we are competitors of theirs.

Q. Was your father a candlemaker?

A. In his early days when he came over from Europe, that was in 1867, right after the Civil War.

Q. That is your grandfather? A. What?

Q. That is your grandfather?

A. No. That is my father. My grandfather, on

(Testimony of Norbert C. H. Muench.)

my maternal side, came over before the Civil War, around in the 1840s, but he was not in the candle business then. He didn't go into the candle business until after the Civil War.

Q. But your grandfather and your father actually were in the candle business, is that correct?

A. Yes.

Q. How about the other members of your family, they are all candlemakers, too, aren't they?

A. Not all of them. Some of them are doctors, one was a druggist, one was in the oil business.

Q. What I am trying to bring out is candle-making is a [115] tradition in your family, isn't that correct?

A. Yes, it is, a great number of the family are connected with it.

Q. Have you made a study of the various prior art patents that have been pleaded in the answer in this case?

A. If you mean these patents like the Nelson——

Q. Nelson, Fredericks, Sterry, and so on.

A. Yes, I have.

Q. Refer now to Defendant's Exhibit A and I will ask you to refer particularly to the patent to Nelson, No. 1,908,044. I believe you have made some notes in your own handwriting as to disclosures in these patents, and I wish you to explain to the court what the Nelson patent teaches and its relevance to the Wilson patent in suit.

A. The Nelson patent was originally taken out to get protection on a colored flame candle, and in

(Testimony of Norbert C. H. Muench.)

testing out these patents like the Nelson and the Fredericks, particularly, I found that they made a better colored drip candle than they did a colored flame candle. [116]

Q. Well, now, what does Nelson disclose as to how he forms a candle?

A. Well, he soaked successive portions of wick in a saturated solution of metallic salts and allowed that to dry, and then he added to it some coatings of candle wax or paraffine, which is a candle wax, and with some of these metallic salts held in suspension.

After that he coated the candle with succeeding layers of candle wax until he had a candle.

Q. Have you made any samples of candle in accordance with your conception of the teachings of the Nelson patent? A. I did.

Q. Will you select from that box I just handed you a sample of a candle as just referred to, and tell me what it is made of, who made it and further identify it?

A. You, I presume, want an unburned candle?

Q. An unburned Nelson, if you please.

A. Here is an unburned Nelson candle that I made on March 10, 1956.

Q. Will you describe how you made that?

The Court: What is it?

The Witness: What is it, your Honor? /

Mr. Lyon: Pardon me.

The Court: He says, "Here is an unburned candle." What is the exhibit number? [117]

(Testimony of Norbert C. H. Muench.)

Mr. Lyon: We have already numbered these.

The Clerk: No. D, I believe it is.

Mr. Lyon: Exhibit D. The candle just identified by the witness is offered as Defendant's Exhibit D.

(The document referred to was marked Defendant's Exhibit D for identification.)

Mr. White: Do you have any duplicates of that, counsel?

Mr. Lyon: I believe I have.

Mr. White: I should like to have one.

Mr. Lyon: Do you have another one there, Mr. Muench?

The Witness: Yes.

(The candle referred to was passed to counsel.)

Q. (By Mr. Lyon): Will you describe the method of manufacturing that candle and the ingredients?

A. Beginning with 9-Ply wick, I soaked successive parts of the wick in a saturated solution of the following metallic salts:

Beginning with copper acetate, which was made by Mallinchrodt of New York City, the second was iron salts made by Du Pont, the third was copper chloride by Mallinchrodt, and the fourth was cadmium sulphide made by the Fisher Scientific Company of Pittsburgh.

After drying the wick I immersed the wick in a wax mixture containing the same salt for each corresponding part and [118] allowed to harden.

(Testimony of Norbert C. H. Muench.)

I then dipped the prepared wick in candle stock to the desired size here.

Q. Would you light that candle, please?

A. (Lighting candle.)

The Court: You said you dipped this candle stock?

The Witness: Yes.

The Court: Is this the kind of candle stock that is non-drip or generally referred to as the drip stock?

The Witness: The stock isn't such that it would be non-drip. There aren't any candles made that in the draft really won't drip.

These candles are made particularly, as all these supposed multi-colored drip candles, with a small wick so they haven't the capacity to carry the amount of wax.

Any of these candles in a room that has no draft—for instance, with the so-called drip candles—if they are put in with a large wick, won't drip at all if there is no draft, so they are not really a dripping candle unless the wick is small.

The Court: That is what makes it drip?

The Witness: That is what makes it drip.

The Court: The size of the wick?

The Witness: The size of the wick. If there is a strong draft they will drip anyway with a large wick because in [119] burning the flame is supposed to stand upright. If there is a draft like you have here blowing the flame sideways, it heats the edge of the candle and melts down that edge and allows

(Testimony of Norbert C. H. Muench.)

the wax to drip out, whether it is white or colored or any anything else.

Q. (By Mr. Lyon): I notice that Exhibit D which you have now lighted is beginning to drip. Would you care to state for the record whether the dripping is colored dripping from the main body of the candle?

The Court: Quite obviously it is. I do not know whether it is green or blue.

What is it?

The Witness: I would say it was green.

Q. (By Mr. Lyon): Do you know what *alst* that is?

A. That is copper acetate that gives that color.

Copper acetate. incidentally is a metallic salt that we have used for years for coloring candles, all kinds.

The Court: There is none of that color in the wax of the candle, I mean it is just in the wick?

The Witness: Excepting for a small core where there was some mixed in, just a very small core next to the wick.

The Court: By "small" you mean?

The Witness: Less than a quarter of an inch.

Mr. White: Would the witness care to comment on the color of the flame?

The Witness: Occasionally, if you will notice it closely, you will get a very bluish or greenish—when it blows like that you will notice that greenish halo around there.

(Testimony of Norbert C. H. Muench.)

Mr. White: It looks to me like any other candle flame color.

The Witness: Possibly I am not as color-blind as you are, but that has the decided halo of green.

The Court: It does?

The Witness: Yes, sir. I think you have to get up closer to it in order to see it.

The Court: From where you are sitting it is the regular—what color—yellow flame, is that right?

The Witness: Most candle flames, in fact all candle flames, are yellow on account of the organic material from which they are made, which has a great deal of carbon in it. [121]

Q. (By Mr. Lyon): Mr. Muench, will you now turn your attention to the Fredericks patent No. 2,184,666, and explain the teachings of that patent to the court?

A. In manufacturing that according to the teachings—

Q. I didn't ask you that, Mr. Muench. I asked you what the patent in general shows.

A. The patent shows a candle made for the purpose of having a colored flame by using metallic salts of various kinds, by laying them alongside a wick, and then incorporating some of the salts longitudinally along the side of the wick.

Q. More than one salt, is that right?

A. Yes.

Q. The patent states that the flame is going to change color, is that right?

(Testimony of Norbert C. H. Muench.)

A. According to the salt used.

Q. Did you prepare a sample candle illustrating the teachings of the Fredericks patent?

A. I did.

Q. Will you pick one out? Do you have an extra one for Mr. White? A. Yes.

Mr. Lyon: Which I will offer in evidence as Defendant's Exhibit E.

The Witness: Do you see this green halo? [122]

Mr. White: The witness asked me a question, if I saw the green halo.

We have a rather heavy circulation of air from the conditioning system here, but to me the flame as represented in the Nelson patent as being azure does not appear to me in perhaps my color-blind condition, but it does not appear to be an azure flame.

The Witness: You are standing far away. If you got closer to it, you would notice it.

Mr. Lyon: Never mind arguing with the attorney, Mr. Muench.

The Witness: Excuse me.

The Court: I think if you put it over this way, it wouldn't get so much draft. I don't know. The draftiest place in the court room is on the bench.

Mr. Lyon: Let the record show that I am now lighting Defendant's Exhibit E.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit E.)

Q. (By Mr. Lyon): Will you explain the manufacture—in the first place, Mr. Muench, you per-

(Testimony of Norbert C. H. Muench.)

sonally made these candles, Defendant's Exhibits D and E? A. Yes.

The Court: This other one, Defendant's Exhibit D, now has a flame—I think it is yellow and blue changes. [123]

Mr. Lyon: It is our position, your Honor, that though they were intended to be flame coloring candles, they are actually better drip candles.

Q. (By Mr. Lyon): Will you explain the manufacture of Defendant's Exhibit E, please?

A. I used a 9 ply wick. I first dipped the wick in paraffine to keep the wick straight. I then dipped a melted petrolatum. I then covered one side of the wick with salts in the following longitudinal order: Copper acetate made by Mallinckrodt, New York City; iron salts made by du Pont; copper chloride made by Mallinckrodt; and cadmium sulphite made by Fisher Scientific Company. I then dipped the coated wick in paraffine to seal in and hold the salts in place. I then dipped it in candle stock to the desired size.

Q. Will you refer to the Fredericks patent, and particularly to page 2, second column and recite some of the salts which Mr. Fredericks suggests can be used, at the lower right-hand corner.

A. Well, he recites the halides, the nitrates, nitrites, acetates, oxysalts, ammoniates, chlorates, perchlorates alcoholates, oxides and hydroxides, and other salts of sodium, potassium, lithium, boron, thorium, strontium, iron, copper, calcium, barium,

(Testimony of Norbert C. H. Muench.)

cerium, and also powdered aluminum and magnesium.

Q. Are the salts, with the possible exception of the [124] cadmium sulphide, that are in Defendant's Exhibits D and E, listed among those salts that you have just read off?

A. I believe they are, yes.

Q. Refer now to the patent to Field, the British patent to Field, No. 122, and explain the teachings of that patent.

A. The Field is a British patent whereby he provides several methods, but I used a method whereby, which is covered under his, where I took round rods and inserted in a mold and poured candle wax around the mold until it hardened and then I took the candle with the rods out of the mold and withdrew the rods and then poured colored wax into the hole.

Q. Is it fair to state that the Field patent shows alternate systems in one of which he paints different colored coloring on the outside in grooves on a candle, and in another of which, by means of the rods, he makes spaces in the candle in the body of the candle, which he can fill with different colored wax.

A. That's right.

Q. I hand you a candle and ask if that is a candle prepared by you according to one of the methods taught in the Field patent.

A. Yes, this is what we call a Byzantine candle. It is ordinarily a candle with twisted ridges on the outside, one of many of that type of candle being

(Testimony of Norbert C. H. Muench.)

used and having been [125] used in the candle business for many years, and I laid color in the grooves of that candle as shown on this sample, and then dipped the candle into a white paraffine, in order to give it a finish. Of course, successive dips of candle stock on there would sort of cover up all those colors, so as to place them inside the body of the candle.

Q. May I interrupt a minute?

Do you care to make a statement for the record of the condition of Exhibits D and E at the present time?

A. Exhibit D has entered into the state of the iron salts, which gives the lighter color there. Exhibit—the Fredericks patent, Exhibit E, is apparently still in the copper acetate field there, burning down and dripping green colored wax.

Q. (By Mr. Lyon): It is obvious, however, that it is dripping a different colored dripping over the candle, the main body of the candle?

A. That is right.

Q. In both cases? A. Yes.

Q. You have found that Exhibit D has already changed colors at least twice, is that right?

A. Yes.

Mr. White: Is there much difference in the colors of the flames?

The Witness: No, because the organic material of which these candles are made is so basically superior that it will not color all of the yellow flame.

That is the difficulty with making the colored flame candle.

(Testimony of Norbert C. H. Muench.)

Mr. Lyon: The candle just identified by the witness as representing one phase of the teaching of the Field British patent, No. 122, is offered as Defendant's Exhibit I-A.

The Court: I-A?

Mr. Lyon: Or I-1, I guess we had better make it.

The Court: Let us call it I-1.

(The exhibit referred to was marked Defendant's Exhibit I-1 for identification.) [127]

The Witness: I have made some samples here with the Field patent with the three colors cast inside.

Mr. Lyon: The candle just identified by the witness, the same being a Field candle with the three colors embodied in the body by means of apertures in the body formed by rods that were placed in the the body during the forming of the candle and then removed, then as I understand it you filled those aperatures with colored wax, is that correct?

The Witness: Yes.

Mr. Lyon: Let me have the burned one.

The Witness: (Passing exhibit to counsel.)

Mr. Lyon: This is offered as I-2.

(The exhibit referred to was marked Defendant's Exhibit I-2 for identification.)

Mr. Lyon: Your Honor will note the colored cores.

The Court: There are three colored cores.

Mr. Lyon: That is right.

The Court: But the wick is not colored?

The Witness: No.

(Testimony of Norbert C. H. Muench.)

Mr. Lyon: No.

If you want one of those, Mr. White, you may have one.

Mr. White: And there is no difference in the color combination longitudinally of the candle?

The Witness: You mean of the——

Mr. White: We have three wax-filled passages throughout [128] the candle.

The Witness: Yes.

Mr. White: Each of them contains the same coloring wax?

The Witness: Three different colors, one color in each aperture.

Mr. White: And therefore as the candle burns the waxes will melt and we will have the same color dripping throughout?

The Witness: No, they will blend.

Mr. White: They will blend?

The Witness: Yes.

Mr. White: They will blend but you have the same color throughout?

The Witness: The length of the candle.

Mr. White: You can see the colored shafts at the end of the candle, can you not?

The Witness: That is right.

Mr. White: So that you know what is in the candle?

The Witness: That is right.

The Court: And so you will know what it will do?

The Witness: Yes.

Q. (By Mr. Lyon): Mr. Muench, I hand you

(Testimony of Norbert C. H. Muench.)

what has been previously identified as Defendant's Exhibit F and ask you to tell me what that is and what the history of that candle is with respect to your organization. [129]

A. That is what we identify as a No. 228 Star Pillar candle.

We have had this in our line from approximately 1940 and have used it continuously since then because it has been a popular candle.

We made that in several ways, in the straight candle with a colored body, or outside, and then another one, which this is a representative sample of, with a white outside and a red core, the idea of the red core is to drip over the white when the candle is burned.

Mr. Lyon: We also have Defendant's Exhibit O, which the clerk has marked in evidence and the court reporter has merely identified or has marked it for identification. I will offer it in evidence.

(The exhibit heretofore marked Defendant's Exhibit O for identification was received in evidence.)

Q. (By Mr. Lyon): I will ask if you will describe what that is and tell me its history.

A. That is our No. 117 rope candle. We have had it in our line for approximately the same time as we have the No. 228 Star Pillar candle.

That is also made in various colors and along the same line as the Star Pillar candle, that is, with colored cores or without colored cores. [130]

Q. Let's take another look at Exhibits D and E.

(Testimony of Norbert C. H. Muench.)

It is quite obvious now that they have both changed colors in the drippings. A. Yes, sir.

Mr. Lyon: I think they have burned far enough. We want to have something left for the Court of Appeals to take a look at.

The Court: The flame on Exhibit D is now a yellow flame, and the flame on Exhibit E, it spits a little.

Mr. White: What color is it supposed to be, Mr. Muench?

The Witness: Well, the patentee I suppose wanted to have it as much as possible in the color from which he made the salts, but the hydrocarbon, which is the paraffine in there, is organic and it will always burn with a yellow flame, and that is predominant because it just works out that way. They never were able to overcome the yellow. That is due to the nature of the material.

Mr. White: In all practical effect, then, the patents are not operative to produce colors in their flames as the patentee represented them to.

Mr. Lyon: I will object to that. Just look at that candle burning right now, it is as blue as a flame can burn.

The Court: It is blue and yellow.

Mr. White: Just a moment. I asked him whether the candle would perform as the patentees represent them to perform [131] according to flame color.

The Court: When you get around to cross examining him you can ask him then.

Mr. White: Thank you.

(Testimony of Norbert C. H. Muench.)

Mr. Lyon: I think we had better blow these out to save the candles.

The Court: I had understood that they were going to produce different colors. All they have produced up to now is a green and then the white that is mixed with it.

Mr. Lyon: There are several different colors there.

The Court: Several different colors of melted wax?

Mr. Lyon: Yes.

The Witness: That candle is dripping on the side, your Honor. Don't hold it over to one side too much.

Mr. Lyon: Let them burn a little longer.

The Court: Is there supposed to be some red in there?

Mr. Lyon: No.

The Court: No red in either one of these candles, is that right?

The Witness: That is right.

The Court: The colors are shades of blue and green, is that right?

The Witness: That is right. Blue, green and that iron salt which gives the lighter color, but which is blended in and influenced by the green which started off the candle. [132]

The Court: I have blown out Exhibit E, for the record.

Mr. Lyon: Let us blow out Exhibit D.

(Testimony of Norbert C. H. Muench.)

The Court: Exhibit D is also blown out, for the record.

Mr. Lyon: I will offer Exhibits O and F in evidence.

The Court: Admitted.

(The exhibits referred to were received in evidence as Defendants' Exhibits O and F respectively.)

The Court: Let me see, the rope candle is Exhibit O?

Mr. Lyon: That is right.

The Clerk: D and E both admitted?

The Court: Admitted.

(The exhibits referred to were received in evidence as Defendants' Exhibits D and E, respectively.)

The Court: D, E, and F was admitted yesterday.

The Clerk: How about I?

The Court: I-1 and I-2 are admitted.

(The exhibits referred to were received in evidence as Defendants' Exhibits I-1 and I-2 respectively.)

Q. (By Mr. Lyon): Turning now to the patent to Housamann, the German patent, explain, if you will——

The Court: Let me see, that translation is in the stipulation there?

Mr. Lyon: That is right.

(The document referred to was passed to the court.) [133]

(Testimony of Norbert C. H. Muench.)

Q. (By Mr. Lyon): Will you explain the teachings of that patent?

A. The Housamann patent teaches a core of colored wax in order to distinguish a candle and to identify it. I made several candles up according to that teaching.

I again used a 9-ply wick and dipped them into candle wax colored with Du Pont aniline dye red.

I dipped the wick six or seven times to get a thickness of about one-quarter of an inch and then let it cool.

I then dipped these red cores in white candle wax until I obtained a candle of suitable thickness.

Q. You have in your hand a candle. Is that a candle made in accordance with the process you just described?

A. This candle was made by me according to the Housamann teaching.

Mr. Lyon: The candle identified by the witness is offered as Defendants' Exhibit H.

(The exhibit referred to was marked Defendants' Exhibit H for identification.)

Q. (By Mr. Lyon): That candle will drip what?

A. That particular candle will drip red. Of course if other colored dye were used it would drip according to the color of the dye.

Q. You have burned this candle and it is obvious that [134] it is dripping red over the white exterior, is that correct? A. Yes.

The Court: That is what exhibit?

The Clerk: Exhibit H.

(Testimony of Norbert C. H. Muench.)

The Court: Is it offered?

Mr. Lyon: Yes, sir.

The Court: It is admitted.

(The exhibits heretofore marked Defendants' Exhibit H for identification was received in evidence.)

Q. (By Mr. Lyon): Will you now refer to the British Patent No. '95, to Sterry, and explain briefly the teaching of that patent and the pertinency of that to this litigation?

A. That patent was apparently taken out to improve the appearance of the candle by taking a wick and ironing various analine colors into the wick with a hot iron.

Q. Did you make a candle in accordance with that teaching?

A. Yes, I used a 9-ply wick again and I ironed it to the wick with a small iron which I heated aniline colors in this order: analine blue, analine pink and analine violet, which I mentioned in the patent.

I then dipped these wicks in wax to make a candle

Q. I hand you a candle and ask you if that is a candle made by you in accordance with that description. [135]. A. Yes, this was made by me.

Q. Is that candle illustrative of your conception of the teachings of the British patent to Sterry?

A. Yes, it is.

Q. And it has been burned, I notice, and it has dripped through over a white body.

(Testimony of Norbert C. H. Muench.)

A. Yes.

Q. If we burned that further would it change color? A. Yes, it would.

The Court: You mean a different color?

The Witness: It would change to pink. I placed the analine colors in——

Mr. White: What was the third color?

The Witness: Violet.

The Court: Blue, pink and—that is blue now?

The Witness: It is blue now.

The Court: And it would change from pink to what?

The Witness: Then to violet.

Mr. Lyon: The candle just identified by the witness is offered in evidence as Defendants' Exhibit G.

The Court: Admitted.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit G.)

Mr. White: Do you have an extra of that candle, counsel?

Mr. Lyon: I think we have. [136]

Q. You have on your table there a series of booklets—— A. Catalogs.

Q. Catalogs? A. Yes.

Q. What are those?

A. These are the catalogs which we have issued for our novelty candles and colored candles from year to year. [137]

Q. Covering what years?

A. Since beginning 1940.

(Testimony of Norbert C. H. Muench.)

Q. '40 through——

A. '40 to date. This one was issued in 1955.

Q. The top one? A. Yes.

Mr. Lyon: The catalogs just identified by the witness are offered in evidence as Defendants' Exhibit J.

The Court: Admitted.

(The catalogs referred to were received in evidence and marked as Defendants' Exhibit J).

Mr. Lyon: The record isn't clear whether Exhibit N is in evidence. If it isn't, I would like to offer it at this time.

The Clerk: I show it in.

The Court: There isn't any foundation for it, except your speech.

Mr. Lyon: I think Mr. White took Mr. Muench over this pretty carefully yesterday.

The Court: It that right?

Mr. White: No, your Honor: I don't recall having taken him over it.

The Court: I think you made a statement about it.

Q. (By Mr. Lyon): I show you what has been offered for identification as Defendant's Exhibit N and ask you to tell [138] me what that is and what it illustrates.

A. This is a plaque we made up several years ago to show how we manufacture our Make-a-Rainbow candle. To the left is the wick itself, a 9-ply wick. On that wick we cast a core of about a quarter of an inch in diameter of white candle stock. On

(Testimony of Norbert C. H. Muench.)

that core we paint successive strips of colored wax, which we called yesterday mother color. After that we dip the candle in successive dips to the desired diameter of the candle. This last one shows the candle after the bottom is cut off, in order to give a base.

Q. Is that illustrative of the practice of the Emkay Candle Company or the Muench-Kreuzer Candle Company in making its drip candles, colored drip candles, since September 5, 1952?

A. Yes; and we haven't varied from it.

Q. Is any dye applied directly to the wick in that process?

A. Not since September 5, 1952.

Q. Is the dye which is contained in the candle dissolved in the body of the wax in your Make-a-Rainbow candles as exemplified by that process?

A. As we make it, we dissolve the dye into a stock so as to make a mother color, and from that we paint that onto the core of the candle. We never have used dye straight in any of our candles.

Q. What happens—— [139]

Mr. White: Do we have an answer to counsel's question, is there dye in the body of the candle?

Q. (By Mr. Lyon): Answer it again, will you, please? Is the dye dissolved in the wax of the candle?

A. In the body of the candle wax? No. That is, it is painted on here in this fashion.

Q. It is painted on in wax, though, is it not?

A. In wax, yes.

(Testimony of Norbert C. H. Muench.)

Q. It is dissolved in that wax?

A. It is dissolved in wax and then painted onto the core of the candle.

The Court: And becomes a part of the body?

The Witness: And becomes a part of the candle where it touches.

Q. (By Mr. Lyon): I show you a candle which was handed to me yesterday by Mr. White and said to be a copy of Plaintiff's Exhibit 12, and ask if you don't notice in that candle a rather peculiar condition, and if you will explain it to the court how it got that way.

A. Well, the candle when it ages will have, if there is any dye in it, either on the outside or the inside, will have a tendency—we use the word “bleed” into the body of the wax.

That happens with all dyes, particularly aniline dyes, as the candle ages. And it will be hastened if the candle [140] happens to be kept in a warmer storage place than if it is in a refrigerated storage place.

Q. So that the dye has——

A. The dye has shown through here according to what has been painted below onto the core of the candle.

Q. It has migrated, then?

A. It has migrated.

Q. It is in solution in the body of the wax, is that correct?

A. We use the word bleed.

Mr. Lyon: I will offer the candle just identified

(Testimony of Norbert C. H. Muench.)

by the witness as defendant's exhibit next in order.
It will be Q, I guess.

The Clerk: Exhibit Q.

(The candle referred to was received in evidence and marked as Defendant's Exhibit Q.)

The Court: That is a candle manufactured by whom?

The Witness: That candle is manufactured, I believe, by us. Mr. White represented it as such.

The Court: Exhibit N is also admitted.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit N.)

Q. (By Mr. Lyon): Mr. Muench, I call your attention to Exhibit 13-A, and Exhibit 4-C, and ask you to compare the brightness of the coloring of the wax drippings of those two [141] candles and state, if you can, what that tells you.

A. This candle 4-C is one of Mr. Wilson's candles. Candle 13-A is one of our Deluxe Make-a-Rainbow candles. 4-C is made with the dye on the wick. Our Make-a-Rainbow candle, 13-A, is made with the dye on the core.

In our experiments we found that by placing the dye on the core we got better and brighter colors. And the reason for that is that dyes or colors placed directly against the wick have a tendency, due to the heat of the flame, to oxidize and darken. Consequently, the colors placed on the core will have a tendency to mix with the white candle wax before it oxidizes, and therefore escape the oxidization to the

(Testimony of Norbert C. H. Muench.)

extent that dyes placed directly on the burning wick will do.

Q. When you see a nice bright color like 13-A, what does that tell you as to whether or not any of that dye has been materially associated with the wick?

The Court: Are you selling these candles or trying a lawsuit—"a nice bright color"?

The Witness: It certainly shows that the colors have not been oxidized by the heat of the flame. They have escaped that tendency.

Q. (By Mr. Lyon): Does that tell you, then, that the colors haven't been intimately associated with the wick?

A. It certainly does, because otherwise they would [142] have been darkened up to an extent.

Mr. White: Relative to the appearance of those two candles, I want to call attention to the fact that plaintiff's Exhibit 4-C is not in its normal condition, because unwittingly yesterday the clerk had reached up and tipped it over, and the upper part was altered from the condition that normally we have.

The Court: Well, the colors of the melted wax are about the same today as they were yesterday.

Q. (By Mr. Lyon): Mr. Muench, will you refer in Exhibit A to the patent to Funke.

The Court: By the way, this is a good time for a morning recess, which we will now take.

(Recess taken.) [143]

The Court: You were turning to what patent?

(Testimony of Norbert C. H. Muench.)

Mr. Lyon: We are going to take a slight detour, your Honor.

The Court: Very well.

Q. (By Mr. Lyon): Mr. Muench, in 1953 at my request did you make up some candles generally in accordance with the teachings of the Nelson and the Fredericks patents? A. I did.

The Court: What do you mean, generally in accordance with the teachings?

Mr. Lyon: I will have him describe exactly what he did, your Honor.

The Court: Very well.

Q. (By Mr. Lyon): I hand a candle to you which has been identified by the clerk as Exhibit D-2.

(The exhibit referred to was marked Defendants' Exhibit D-2 for identification.)

Q. (By Mr. Lyon): I will ask you to tell me what that is.

A. I made that up in 1953, I think. I have my notes here.

I made this up on February 2, 1954, tagging it it after I got through with a Nelson tag, and I made that up on the same [143a] basis practically as I described before.

Shall I describe how I made it again?

Q. Please do.

A. I used a 9-ply wick. I soaked successive parts of wick in saturated solutions of the following and in this order:

(Testimony of Norbert C. H. Muench.)

1. At the top, orange red No. 621 made by Sheppard Chemical Company.

2. Copper acetate made by Fisher Scientific Company, Pittsburgh.

3. Brown C-59 made by Sheppard Chemical Company, Cincinnati, Ohio.

And 4. Copper chloride made by Merck & Company of Rahway, New Jersey.

After drying I dipped the wick in a wax mixture containing the same salts for each part and allowed to harden.

I then dipped the prepared wick in candle material to complete the candle.

Now I would like to identify those which I used as some may think it is an aniline color, like orange red 621 is made from cadmium sulfo selenides.

Blue 1 is a cobalt aluminate.

And the brown C-59 is a spinel composed of iron, chrome and magnesium.

Q. What is a spinel? [144]

A. It is a sort of a mixture. It is a technical term which I can't give offhand. It is in that book I have.

Q. Is it a mixture of metals?

A. It is a mixture of metals in a certain way.

Q. Referring to the Nelson patent, page 1, at the bottom of the first column, will you read off some of the various metallic salts that are suggested by Nelson?

A. Beginning with line No. 43 it says:

"To cite a few examples of a great variety of salts

(Testimony of Norbert C. H. Muench.)

which can be used in connection with the present invention, strontium salts, e. c., chloride, nitrate, sulphate, give a scarlet flame; barium salts give a green flame; potassium salts produce a violet flame; copper halides give an azure flame; zinc salts produce a white flame; selenium salts produce a light blue flame; calcium salts produce a brick-red flame; sodium salts produce a bright yellow flame of a more definite and intense yellow than an ordinary flame." [145]

Q. If you took any of those salts which in their natural state are white, they wouldn't color the drippings of a candle, would they?

A. Of course not, not as long as the candle body was white.

However, they might color a red or a brown or a black candle body white on account of the contrast of the salts.

Mr. Lyon: Let the record show that I am lighting Exhibit D-2.

Q. Calling your attention to Exhibit E-2, will you explain what that is?

A. E-2 is a candle I made——

Q. Just a minute. Before you go ahead, Mr. Muench. I offer Exhibit D-2 in evidence.

The Court: Admitted.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit D-2.)

Q. (By Mr. Lyon): Now go ahead, please, on E-2.

A. Exhibit E-2 is a candle I made under the

(Testimony of Norbert C. H. Muench.)

Fredericks patent on October 19, 1953. I used a 9-ply wick. I dipped the wick into melted petrolatum. I then covered one side of these wicks with salts in the following longitudinal order:

(1) Orange red No. 621, made by Sheppard of Cincinnati; Blue No. 1 made by Sheppard of Cincinnati; copper acetate made by Fisher Scientific Company, Pittsburgh; brown C-59 made [146] by Sheppard of Cincinnati. I then dipped the prepared wicks in melted paraffine to seal in and hold in place the salts on the wick. I then dipped the prepared wicks in candle stock to the desired size.

Those are the same salts as I described on the Nelson patent.

Q. I don't want to argue with you, but how about that blue?

The Court: How about what blue?

Q. (By Mr. Lyon): Blue No. 1. That wasn't in Nelson, was it?

A. Blue No. 1 was made by Sheppard. It is a cobalt aluminate.

The Court: What is Blue No. 1?

The Witness: That is how they identify for——

The Court: Coloring material?

The Witness: Yes.

The Court: I beg your pardon.

Mr. Lyon: That is one of the metallic salts, your Honor, that is in the candle that he just identified.

The Court: Very well.

Mr. Lyon: The candle just identified by the wit-

(Testimony of Norbert C. H. Muench.)
ness is offered in evidence as Defendant's Exhibit E-2.

The Court: Admitted. [147]

(The candle referred to was received in evidence and marked as Defendant's Exhibit E-2.)

Mr. Lyon: With the court's permission, I will light E-2.

Q. Do you care to comment on the state of the drippings on candle D-2 at the present time?

A. It is just beginning to drip, and at this point it has a sort of a pinkish hue to it.

Mr. White: May I inquire as to what flame color Orange Red 621 is supposed to give?

Mr. Lyon: What flame color?

Mr. White: Yes, what flame color.

Mr. Lyon: I don't know.

The Witness: Well, as they work out, Mr. White, they really do not affect the flame very much. But they would give one out that is called for by them, by either patent, for a cadmium with a sulfo selenide mixture. Now, what color it would be, I really don't know.

Mr. White: Isn't it true that neither patent even mentions cadmium?

The Witness: It may be. But they say, "or other salts" in there, as I recall. So they don't limit themselves to what they just mentioned.

Q. (By Mr. Lyon): What you were doing in 1953 in investigation was to try to find the best coloring metallic salts [148] that you could find, is that right? A. Yes.

(Testimony of Norbert C. H. Muench.)

Mr. White: That is objected to as highly leading. I don't object to him being asked what he did, but I think that is entirely leading.

The Court: It is, but is is answered. If I sustained the objection, he would turn right around and say, "What did you do?" and he would answer it. The harm is done.

Q. (By Mr. Lyon): Will you please now refer in Exhibit A to patent No. 1,701,844, to Funke, which was a file wrapper reference, and explain the disclosures in that patent to the court?

A. Will you ask that question again, please, Mr. Lyon?

Q. Will you refer to the patent to Funke and explain what that teaches?

A. Well, this teaches the idea of having a colored flame,, and also in perfuming and tying it up with the color of the wax of the candle. But it only calls for one color to a candle.

Q. What kind of dye, if any, does it disclose?

A. It calls for such things like potassium nitrate, liquid sulphur, copper sulphate, and strontium nitrate.

Q. How about the candle body, is it colored with any kind of a dye?

A. I think he mentioned in here that they can be a [149] colored candle, and also he mentioned the fact that they perfume the candle, too. He says to obtain a red candle, red aniline dye is added.

Q. That is what I mean. He suggests using aniline dye to color the candle body, is that correct?

(Testimony of Norbert C. H. Muench.)

A. That's right.

Q. May we have your attention again to these candles D-2 and E-2? D-2 has now dripped red, is that correct?

A. Yes, sir.

Q. And E-2 has dripped pink, is that correct?

A. Pink. It will blend into a red as it progresses.

Mr. White: For the record, I should still like to know what color that flame is supposed to be in accordance with the teachings of the patents which the exhibits allegedly represent.

The Court: Do you mean what color flame on D-2 and E-2?

Mr. White: These patents state that when they are followed, certain flame colors will be produced.

The Court: What color is D-2?

The Witness: It is quite evident that the carbon has overcome any ability——

The Court: It is a yellow color, isn't it?

The Witness: Yes.

The Court: What color was it supposed to be?

The Witness: I imagine it was supposed to be sort of a [150] reddish color.

The Court: Now, E-2 at this point?

The Witness: The same thing.

The Court: Both of them are yellow?

The Witness: Yes.

Mr. White: In reality, they are ordinary candle flame colors, are they not?

The Witness: That is right.

I have never succeeded to get a real colored flame, I mean where you overcame the yellow flame, and I

(Testimony of Norbert C. H. Muench.)

don't think anybody else has with all of their patents. They have achieved it in part, but not entirely so.

Q. (By Mr. Lyon): Some time ago, prior to making a drip candle, a color-changing drip candle, did you make an investigation as to colored flame candles?

A. Yes, I did. Prior to the second World War I was out in Chicago, and we had a cosmetic house run by a Negro by the name of J. Turner Wall, who ran the O-PAL Manufacturing Company. He made cosmetics for the Negro trade, making hair dekinkers and things of that kind. We sold them beeswax for their cosmetics. While I was with him he spoke to me of making colored flame candles, which he wanted to incorporate into a religion, whereby we would supply candles that would burn with different colored flames, like red, blue, and green, and he apparently was going to build up a religious sect around that idea.

I experimented, after I got back to Syracuse, with various types, but I never could produce one that would burn with a colored flame, because the yellow, like these show, would always come out and predominate.

Q. You gave me one of those candles, didn't you, that you made at that time? A. Yes.

Q. We burned one in my office the other day?

A. That is right. It burned with a colored flame but had a tendency to drip more with the color of the salts in the wax.

Q. Intermittently it would exhibit periods of

(Testimony of Norbert C. H. Muench.)

colored flame and then revert to normal flame, is that correct? A. That is right.

Q. You noticed the same thing with respect to Exhibits D and E when they were burned here a while ago. As the judge said, they spit at you once in a while with colored flame, is that right?

A. That is right.

Mr. White: How frequently do they spit?

The Court: The record will show that it was not very green.

The Witness: Doesn't one of the patents, I think it is the Fredericks, mention that with magnesium aluminate he gets a sparkle with it. I suppose that is what he means by throwing out sparks.

Mr. Lyon: Cross examine.

Before that, I am not sure whether I offered Exhibits E-2 or not. I think I have. [153]

The Court: It is admitted.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit E-2.)

Cross Examination

Q. (By Mr. White): Mr. Muench, for what reason and under what circumstances did you make these candles which allegedly follow the prior art patents pleaded in you answer?

A. Such as the Nelson and the Fredericks, to see what they would perform under the experiments that we tried them out at.

Q. How did you come to make up those candle samples? Did you do it on your own?

(Testimony of Norbert C. H. Muench.)

A. What do you mean on my own? I made these candles personally.

A. Did anybody tell you to do it?

A. No, I made them from the tests to find out just whether they would burn with colored flames or whether they would drip.

Q. As I recall, as far back at the time of your trip to Chicago and the testings that followed it, you were then aware that you could not produce a candle that would produce a flame color that would overcome the normal yellowness of the candle, is that right?

A. No, when I had my conversation with J. Turner Wall, [154] it was before I had ever heard of anything about—I heard about colored flame candles but I had never had any experience with them. And Mr. Wall approached me on it and asked me whether I could make some candles that would burn with colored flame because——

Q. Yes, you have testified to that.

The Court: When was that, 1953?

The Witness: No, this was prior to the War and possibly around in the late 30s, maybe '37, '38 or '39.

Q. (By Mr. White): As I recall your testimony, you went back to Syracuse and tried it out.

A. Made experiments.

Q. And you were unable to do it, is that not right?

A. I got a certain amount of colored flame but

(Testimony of Norbert C. H. Muench.)

the candle wasn't a suitable one that you could put out and use in commerce.

Q. Now when you had occasion to make up the exhibits which we here see, under just what circumstances did you make those exhibits? Were you told to do so by your attorney?

A. No. He got the patents for me and we talked them over and he wanted to know what I thought of them, and that is when I made the tests that I explained here.

I had made some tests before this and searched around for different dyes, and so forth, different metallic salts. [155]

Q. So far as the candles we see here, as your exhibits made allegedly in accordance with the prior art patents, is it not true that for all purposes of flame coloring you would consider them commercially unsatisfactory?

A. Yes, I would certainly not produce any colored flame candles with the salts as so far produced.

I might add, though——

The Court: In other words, you wouldn't consider any of these as colored flames?

The Witness: As colored flame candles. Some of them make very good colored drip candles.

Q. (By Mr. White): No one else has succeeded to your knowledge in making a satisfactory colored flame candle using any such expedients, isn't that true?

A. Yes, so far, commercially.

Q. Now when you undertook to make up can-

(Testimony of Norbert C. H. Muench.)

dles which followed the teachings of these patents you proceeded in a manner to make them perform like the Wilson patent, did you not?

A. Well, I followed to the best of my ability the directions given in these different patents like the Fredericks and the Nelson.

The Court: Do the Nelson and the Fredericks patents call for a 9-ply wick? [156]

The Witness: No.

The Court: Do they call for any different size wick?

The Witness: No. No patent so far as I know calls for the size of the wick, and that includes the Wilson patent too.

The Court: If D-2 and E-2 and D and E had been made with a bigger wick so that they would drip—I do not mean in the absolute sense of the word, but in the sense that you have described in your testimony that with a larger wick they do not drip—if they had been made with a bigger wick then would they have had colored flame?

The Witness: No. But let me answer that——

The Court: Did you try it? [157]

The Witness: Oh, yes. I have used different sized wicks, but I will say this, that for the metallic salts you could use a larger wick than you can with aniline colors because aniline colors are consumed in the flame, whereas the metallic salts in the great amount have a tendency to be unconsumable in the flame.

They plug up the pores of the wick and there-

(Testimony of Norbert C. H. Muench.)

fore cause the wax not to draw up and be consumed into the flame but to go sideways, whereas the aniline colors have a tendency to be consumed and burned entirely in the flame of the wick.

The Court: And the salts, it is a combination of the material used for coloring as well as having a small wick that makes it a drip candle?

The Witness: That is correct.

Q. (By Mr. White): Mr. Muench, as of the date of the prior art patents to which you have been referring, is this not a more normal size wick that you use in your Emkay candles——

The Court: This is what?

Q. (By Mr. White): In Plaintiff's Exhibit 14, than what we see in your sample of drip candles that you made up?

A. The wick we used in that box of candles is a 30-ply wick.

Q. And that is as of the time of the Nelson, Fredericks, and Funke and the rest of the patents—I am referring to [158] Plaintiff's Exhibit No. 14—this was a more normal wick than the 9-ply wick that you put into these candles?

A. For a candle of the regular commercial size. That is not a novelty candle.

Incidentally, we have—if I may add—we use all sizes of wicks. We have used 9-ply wicks up to 45 and 51-ply.

We also use a square wick that is used in beeswax candles.

We also use a lead wire wick for votive lights

(Testimony of Norbert C. H. Muench.)

and sanctuary candles, and I believe that is the wick that Mr. Wilson uses in his drip candle. That we primarily use and was developed more for votive lights and sanctuary candles.

The Court: What is that?

The Witness: That is a candle burned in the Catholic Church in votive stands for a prayer offering.

Q. (By Mr. White): I recall your statement as being that you followed the teachings of these prior art patents, is that right?

A. To the best of my ability.

Q. Mr. Muench, can you point out to me in any one of those patents the expression "drip candle"?

A. It is not disclosed in either one.

Q. In any of them as a matter of fact?

A. No, I didn't come across that in any of them.

The Court: By the way, is it all right to extinguish these candles now?

Mr. Lyon: Yes, it is.

Q. (By Mr. White): Now, it is true that the drip-ability or the profuse dripping characteristics of the candle is one of its most outstanding and demanding requirements, is that not true?

A. Which candle are you speaking of?

Q. I am speaking of the type of candle disclosed, or as we see it in the defendant's and plaintiff's commercial candles.

The Court: Defendant's and plaintiff's commercial? You mean defendant's Rainbow candles?

(Testimony of Norbert C. H. Muench.)

Mr. White: That is right.

The Court: And the plaintiff's Magi-Color candles?

Mr. White: That is correct, your Honor.

The Witness: So that I understand it, will you state that again, Mr. White, please?

Q. (By Mr. White): One of their essential and outstanding requirements is that they be drip candles, is that not right?

A. Yes, that is the purpose of the candle.

Q. Without being drip candles they would not perform as they are intended to perform, is that not right? [160]

A. That is right.

I don't know whether I answered that according to the wick, but you mentioned the size of the wick there. Did I miss that?

Q. No, I hadn't intended it that way. I will come to that.

A. Because it is really the size of the wick that, barring a draft, makes them drip.

Q. I will come to that.

The Court: What he is getting at is the purpose of manufacturing, the reason for your Rainbow and the sellings of your Rainbow candles, and the sales appeal of it, is the fact that it drips different colors.

The Witness: That is right.

Mr. White: Because it has the capacity to drip and from drippings into which the colors may be incorporated.

The Court: Yes.

(Testimony of Norbert C. H. Muench.)

Mr. White: We take one step at a time.

The Court: But it would be a drip candle.

The Witness: Yes.

Q. (By Mr. White): Now, do you find in any of these prior art patents any express intention whatsoever of making a drip candle?

A. I came across no word that says for dripping purposes. [161]

Q. Did you see in them any language that would lead you to believe that as they would be manufactured they would be drip candles?

A. Yes, because the salts would plug up the wicks and cause them to drip. In fact, it would be pretty hard to make a non-drip candle, even barring a draft, with these salts, because they are not consumable in the wick, and therefore they plug up the wick and cause the wax to run over the sides.

Q. So, therefore, you would say that these patents were suggestive of using small wicks and not large wicks?

A. Well, no, I didn't say that. I said that even if you used a much larger wick, say a 30-ply wick, and you got plenty of salts in there, you would have a dripping candle.

To give you an example of that that we have, prussian blue was made of iron salts. It is a beautiful blue, and it is a permanent blue, much better than aniline blues ever were and ever will be, in my opinion. Now, we have tried to use, and we do in some circumstances use prussian blue, but we avoid it on a solid colored candle, and we avoid

(Testimony of Norbert C. H. Muench.)

it when the candle doesn't have to stand up too long in shade, because prussian blue made of iron salts has a tendency to get into the pores of the wick, plug them up, and cause the candle to drip.

Q. Do you happen to recall Mr. Funke's statement, which I believe is the only reference in all you prior art [162] patents, to wicks that would be used with this type of candle, the type of candle in which the flame is to be colored.

The Court: I think you have two or three questions and an argument in that question, and if he answered it I wouldn't know what it meant. Your question is: Does he recall what statement in Funke?

Q. (By Mr. White): First, is it not true that Funke is the only patent among these listed in your answer that refers to wicks or wick sizes to be used in candles of this flame colored type?

The Court: That refers to wicks, or to wick sizes, which is your question?

Mr. White: To wick sizes, your Honor.

The Court: To wick sizes?

Mr. White: Yes.

The Witness: I don't recall where he mentioned wick sizes at all. I wish you would point it out to me.

Q. (By Mr. White): Referring to the Funke patent, column 1, lines 32 through 44:

"The several chemicals that will give the candle flame the desired color will be mixed with the inorganic wax in the proportions (paraffine 75 per cent and stearic acid 25 per cent) or they may be

(Testimony of Norbert C. H. Muench.)

incorporated in a specially prepared wick woven from long staple cotton to hold the chemicals [163] contained in solution in which the wick will be immersed, and then dried, the wick being larger than the usual wick to permit it to absorb enough of the solution containing the flame coloring chemicals to properly color the flame."

A. He doesn't mention any particular size. He just uses the word "larger." I wouldn't know how much larger he would mean by that. Possibly just as much as he could get. If he went too far, he would get a torch, instead of a candle.

Q. You certainly wouldn't, in following Funke's teachings, use a 9-ply, wick would you? Is a 9-ply larger than the usual wick?

A. A 9-ply is smaller than the wick that we use in the standard candle.

The Court: What do you use in the standard candle?

The Witness: That particular candle in the gold box, we use a 30-ply. But we also use 24-ply in certain types.

The Court: Does the number of the ply——

The Witness: It means a larger wick.

The Court: The smaller the number, the bigger——

The Witness: The smaller the wick.

A wick can be compared to a pipe that drains out a tank. If the pipe is larger, of course it sucks out the water faster. The same way with a larger

(Testimony of Norbert C. H. Muench.)

wick, it will suck up the wax by capillary action into the flame and burn it faster.

The reason we use a 9-ply wick here, you [164] could use also a 12-ply and a 15-ply and get just as good a burning candle, is that in places where there wouldn't be any draft you would get a quicker drip. We use a 9-ply wick regularly, but here with this draft here, you could have used a 21-ply and you would have gotten a drip, to.

The Court: I see.

Mr. Lyon: Mr. Muench, I hand you a 21-ply candle, which you manufactured in 1953, I believe, and gave to me, in accordance with the teachings of the Fredericks patent; isn't that correct?

The Witness: That is right.

Mr. Lyon: In the afternoon we will burn that.

The Court: Recess to 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken to 2:00 o'clock, p. m.) [165]

NORBERT C. H. MUENCH

The Court: Any ex parte matters?

The Clerk: No, your Honor.

The Court: Proceed.

The Clerk: No. 15273-PH, Lester F. Wilson v. Muench Kreuzer Candle Company.

Your Honor, for the record, the defendant has marked for identification Exhibit H-1 and E-3 for identification only, two candles.

Mr. Lyon: Your Honor, those candles will be burned.

(Testimony of Norbert C. H. Muench.)

The Court. H-1 is whose candle?

The Clerk: It is a Muench Kreuzer candle.

The Court: That is a defendant's candle?

Mr. Lyon: It is a candle, H-1 is a candle made by Mr. Muench in 1952 or '53, following the teachings of the Housamann patent, and it has a 21-ply wick.

Exhibit E-3 is a candle made by about the same time by Mr. Muench following the teachings of the Fredericks patent, also having a 21-ply wick.

And in that case the salts used were copper acetate, copper chloride and strontium chloride.

The Court: They are marked for identification.

The Clerk: Yes, your Honor. [166]

(The exhibits referred to were marked Defendants' Exhibits H-1 and E-3 respectively for identification.)

The Court: Proceed:

Mr. White: Let the record show that we take exception to the gratuitous observation that these were made in accordance with the teachings of the patents.

The Court: The record will show that that is Mr. Lyon's contention.

Cross Examination—(Continued)

Q. (By Mr. White): Mr. Muench, in your testimony concerning Defendants' Exhibit D purportedly following the Nelson patent, I believe you stated that the candle is made using a 9-ply wick coated successively with copper acetate, iron salts,

(Testimony of Norbert C. H. Muench.)

copper chloride and cadmium sulphide, am I correct? A. Yes, sir.

Q. Where in the Nelson patent do you find reference to copper acetate?

A. It doesn't mention copper acetate; it does mention copper chloride.

Q. It does not mention copper acetate.

A. No.

Q. Mr. Muench, is copper acetate and copper chloride the same thing? .

A. Well, they both come from copper. [167]

Q. Are they the same thing?

A. I imagine one is treated differently than the other, Mr. White.

Q. Are they the same thing, the same materials?

A. Well, I can't answer that on the basis that I don't know enough about copper acetate and copper chloride to go into the ramifications of it. But I take it that they are both metallic salts.

Q. But the patent, you say, refers to copper chloride? A. Yes, sir.

Q. Apparently you knew enough about copper acetate to use it instead of copper chloride. Why?

A. Well, copper acetate is a metallic salt that we have used for years, in fact, I remember making it way back in my early days, using copper acetate and stearic acid to make a dye to use in candles, and we have used it for years.

Q. Have you ever used it in your Make-a-Rainbow candle?

A. Oh, yes, we have used it.

(Testimony of Norbert C. H. Muench.)

Q. During what period?

A. In the early periods that we used it?

Q. When.

A. I would say at the beginning when we used it, in 1948, we experimented and I think we used it in '49.

Q. Did it go into the commercially sold candles?

A. At that time I believe it did. [168]

Q. Are you sure?

A. I am quite sure. I can't say definitely but we did use it in those days at some times. At the present time we don't use it for the reason that it has a tendency to color up the others and we have been using the aniline dyes instead of the copper acetate in them. [169]

Q. Analine dyes are wax soluble dyes, are they not?

A. That's right.

Q. Now, the second material, iron salts; what iron salts?

A. Well, I suppose they all have different names. This one, if you want to pin this down to a certain angle, I can give it to you. I can't even pronounce it. It is spelled—this iron salt that we use from du Pont is spelled d-i-c-h-l-o-p-e-n-t-a-d-i-e-n-y-l-i-r-o-n.

Q. May we call it "dichloro" for short, the dichloro iron compound; is it a salt?

A. I would say so.

Q. Do you know whether it is?

A. I am not a chemist, so I can't tell you definitely. It was sold to us as a salt.

Q. You referred to it in your answer as being

(Testimony of Norbert C. H. Muench.)

an iron salt, did you not?

A. Yes, I did, because I was told so.

Q. Do you find reference to that compound in the Nelson patent?

A. No, I don't. Not by that name, anyway.

Q. Why did you use it instead of something mentioned in the Nelson patent?

A. Because these various salts that I got were available to me, they were metallic salts, and I believe both the [170] Nelson and Fredericks patents do not limit it to what they mention in there. They say, "and other salts," or words to that effect.

Q. Do you find any reference in the Nelson patent, even, to iron salts? A. I don't know.

Q. Did you not undertake to find out before you presented to the court that an exhibit is made in accordance with the patent?

A. Yes, I did, to the best of my ability anyway.

Q. Do you find reference to iron salts in the Nelson patent? A. I don't recall.

Mr. Lyon: We will stipulate that there is no reference to iron salts in the Nelson patent. It is mentioned in the Fredericks patent, however.

Mr. White: I suggest that we allow the witness to testify. I am concerned only with the Nelson patent for the time being.

The Court: All right.

Q. (By Mr. White): The fourth compound used in Exhibit D is cadmium sulphide; do you find any reference in Nelson to cadmium sulphide?

A. No, I don't.

(Testimony of Norbert C. H. Muench.)

Q. Why did you use it? [171]

A. Because it was a mineral salt.

Q. You testified that you are not a chemist; how did you happen to select that?

A. Well, possibly because it was available. So many of these salts I wasn't able to get in Syracuse, so I took what was available, being mineral salts.

Q. Let me refer you to a few compounds mentioned in the Nelson patent. Strontium salts, you can get plenty of those, can't you?

A. I suppose so. I got one of them here.

Q. Barium salts, can't you get those from Merck or any chemical supply house?

A. Some of those. Of course, I did not try to get salts that were white, because I realized that many of the strontiums are white salts. It is obvious, unless you use a colored wax, they are not going to show up.

Q. In other words, you were attempting to——

A. Color the wax.

Q. You were attempting to produce the Wilson patent instead of Nelson, is that not right?

A. No. I was trying to go by the patents themselves. I may have not limited myself exactly to the few that Nelson mentions here.

Q. You refer, Mr. Muench, to a few. Let me read you this: "Strontium salts, e.g., chloride, nitrate, sulphate, [172] barium salts, copper halides, zinc salts, selenium salts, calcium salts, sodium

(Testimony of Norbert C. H. Muench.)

salts." Certainly there is plenty of table salt around?

A. That is true. I went over a listing, and I believe in my reply to your questions I gave a listing of salts that had colored—that were colored. Those undoubtedly would color. And I think some of them come within that scope there. But at the time I wasn't able to get any of them in Syracuse.

Q. Mr. Muench, isn't this a fact, you examined the compounds mentioned in this patent and you found reference to some copper halides—copper chloride, and you found that that gives some coloring to wax, but as far as the rest of these compounds are concerned, you couldn't find it in the Nelson patent, so you had to go outside some place and pick up some copper acetate, some dichloro, whatever it is, and cadmium sulphide, isn't that right, you couldn't find it here?

A. We primarily looked for salts that were covered, because we realized if we were limited to salts that were white in color they certainly wouldn't color white wax.

Q. Did you in selecting your compounds that you got outside, did you select them to color the flame?

A. Some of them I did according to this. Now, we did take some of these salts here, and I think this book over here that gives some of the cadmiums, like is it cadmium reds and [173] things like that—I don't know whether it would color the flame, but it would certainly color the wax.

(Testimony of Norbert C. H. Muench.)

Q. But if you are undertaking to reproduce Nelson, you would certainly inquire into whether it colored the flame, would you not?

A. You, yourself, said before that what we made up here, like with these salts, didn't color the flame. So I don't know whether it will or not.

Q. That, I think, is beside the point. But to get down to a concrete question, you selected cadmium sulphide; what color does cadmium color a flame?

A. It seems to me that cadmium would color red, wouldn't it? I am not too sure about that, but I understood that cadmium is used in the fireworks industry where they use it for coloring fireworks in the air. [174]

Q. Do you mean that you prepared that exhibit purportedly in accordance with Nelson without knowing what color the compound or any part of it is supposed to color the flame according to Nelson?

A. In some case, I would say yes, I wasn't particularly interested in coloring the flame in that particular sense. But the strontium that is mentioned here was supposed to color flames.

Q. Would you disagree with me, Mr. Muench, if I asserted that cadmium will not color a flame?

A. I wouldn't know.

Q. I will represent that cadmium won't color the flame and the defendant may check the chemical art or the chemical literature, textbooks, to contradict me if he cares to.

(Testimony of Norbert C. H. Muench.)

Now we come to your Exhibit D-1, which I believe you stated—

A. Which exhibit was that?

Q. D-1, Mr. Muench. That is a second candle purportedly made in accordance with Nelson.

In that I believe you testified that you used orange red 621, and that is supposed to be cadmium sulpha selenide. Do you find any reference to such a compound in Nelson? A. No, I don't.

Q. Next you named copper acetate. Do you find copper [175] acetate in Nelson?

A. As I said before, no.

Q. Next you referred to brown C-59, which is supposed to be a spinel of iron, chrome and magnesium. You find any reference in Nelson to any kind of a spinel? A. Here is selenium salts.

Q. Is spinel a salt?

A. I imagine the spinel is a mixture of salts.

Q. Do you know what a spinel is?

A. I have a book over there that gives a definition of it.

Q. But before preparing your exhibit and to be able to describe it, did you not find out exactly what a spinel is of those metals?

A. Well, I read the definition but, frankly, I have forgotten just what it said in there.

Q. The fourth compound was copper chloride.

A. Yes.

Q. So in this instance we find only one out of four compounds named in Nelson, namely copper chloride, that being a halide of copper, is that correct?

(Testimony of Norbert C. H. Muench.)

The Court: A what?

Mr. White: A halide. A halide chemical is a compound.

The Court: How do you spell it?

Mr. White: H-a-l-i-d-e. [176]

The Court: All right.

Q. (By Mr. White): Is that right? It is a class of compounds. Nelson did not mention, as I recall, copper chloride, but I will give the defendant the benefit of the doubt because copper chloride is a copper halide.

So am I not correct in stating that in the preparation of Exhibit D-2 you used only one compound, one out of the four mentioned by Nelson?

A. There is selenium used here and the orange red 621.

Q. Is cadmium sulphur selenide mentioned?

A. No, not the combination.

Q. Did you know whether or not any other selenium salts would give you a color such as you sought to gain in orange red 621?

A. Well, if the salts were colored, it would color it.

Q. Do you know whether any other selenium salts would give you a similar color?

A. If I had my book over there I could look up the colors of the salts and I could tell you that.

Q. But you don't know without looking it up?

A. I don't know offhand, no.

Q. Now what color would selenium color a flame? A. I believe it would color red.

(Testimony of Norbert C. H. Muench.)

Q. Are you sure? [177] A. No.

Q. What color would a spinel of iron, chrome and magnesium color a flame?

A. I would say that the magnesium would be whiteish but the iron would be reddish.

Q. What does a spinel, all three of them, how would that color the flame?

A. Well, it would be a combination.

Q. Do you know?

A. No, I don't, because I am not a chemist.

Q. Now we have left two compounds, copper acetate and copper chloride, which you used.

Now if we rely on those to color the flame we are going to get one color from the two compounds, aren't we, according to Nelson?

A. According to our tests the copper acetate colored a greenish sort of a flame and the copper chloride has a tendency to color a bluish flame.

Q. Does not Mr. Nelson say that it is the copper which determines what the flame color shall be?

A. Well, possibly so, but then why do you object to copper acetate?

Q. I am not objecting to copper acetate for any reason other than its use contrary to the representations made concerning any conformance of exhibits containing the references [178] or prior art patents which do not contain it.

Is this not true, Mr. Muench, that so far as flame coloring is concerned it is the metal, copper, whether it be in the form of a chloride, the sulphate or nitrate or acetate or what have you?

(Testimony of Norbert C. H. Muench.)

A. I would think so, yes. It would give a basic—you mean it would give a basic background?

Q. That is right.

So if we were making this two-copper compound candle for the purposes of the Nelson patent we would be producing in two sections of the candles the same color, wouldn't we?

A. With a different shading of course.

Q. Mr. Muench, in undertaking to reproduce the Nelson patent as per your Exhibits D and D-2, why didn't you follow the examples given in the patent?

I want to read those examples (column 2, starting at line 84):

“Paraffine wax or a mixture of paraffine wax with a small percentage of stearic acid or beeswax is melted and 1 per cent, more or less, of finely ground strontium nitrate may be added thereto. The wick of the candle may be immersed in a saturated solution of strontium nitrate and properly dried. The candle is then prepared by the usual manner of manufacture, e.g. placing the wick [179] in position and pouring the molten material into the mold or any other improved method of manufacture.”

Will a candle so made have any effect on the coloring of its wax whether that candle drips or doesn't drip?

A. I believe strontium chloride is a white wax. If the body of the candle——

Q. Just a moment. Will you please answer that yes or no. And the compound is not strontium chloride, it is strontium nitrate.

(Testimony of Norbert C. H. Muench.)

A. No, it would not color.

Q. Going to the second example:

“If it is desired to make a candle which will burn with a vari-colored flame, the candle may be built up in sections with mixtures containing salts which give vari-colored flames, e.g. one-third of the candle may be made up with strontium salts, the second third with zinc salts, and the last third with a mixture of copper chloride and potassium salts. The candle itself may be of any desired color, e.g., the top third may be red, the intermediate third white, and the bottom third blue; the flames will correspond substantially to the colors of the sections, namely, red, white and blue.” [180]

Why didn't you give us a representation of the Nelson patent according to that example?

A. Well, I took salts that were naturally colored. Now there are some strontium salts that carry a color but I was unable to get those salts.

Q. There are strontium salts available at any chemical supply house, aren't there?

A. I tried in Syracuse but I was unable to get them.

Q. What about zinc salts, could you get no zinc salts? A. I didn't get any.

Q. But you managed to get copper salts?

A. We had copper salts. We have always used copper salts.

Q. Did you try very hard to get some of these other salts?

The Court: What is “very hard”?

(Testimony of Norbert C. H. Muench.)

Q. (By Mr. White): Did you inquire at any of the chemical supply houses in New York City?

A. In Syracuse, we tried.

Q. How far are you from New York City?

A. About 300 miles.

Q. And in New York City one can find just about any chemical that is on the American market, isn't that true?

A. That possibly is, yes, but they run in various combinations [181] and you seem to object to combinations like I have mentioned.

Q. Now let us refer to your Exhibits E and E-2, purportedly made according to the Fredericks patent.

I believe you testified that Exhibit E contains in succession copper acetate, iron salts, copper chloride, cadmium sulphide.

What iron salts did you use?

A. That is the one made by Du Pont with the long name.

Q. Did you find a reference to it in the Fredericks patent?

A. Not by that long name, no, but I think he does mention iron salts, doesn't he?

Q. Aren't there a great many iron salts?

A. Yes, there are.

Q. Did you try any other iron salts?

A. Yes, we tried some other iron salts, that one that we used here in the spinel.

Q. But alone, did you try and find any other

(Testimony of Norbert C. H. Muench.)

iron salts alone that would work satisfactorily in drip candles to color the wax?

A. No, not salts as such. We tried a number of different salts originally, in fact, I even tried pieces of metal, rusted metal in there, which certainly colored the wax. [182]

Q. Would you use them in the manufacture of a multi-colored drip candle?

A. Not for commercial purposes.

Q. In the Fredericks patent do you find reference to cadmium sulphide, or any cadmium compound?

A. No. There is copper and calcium mentioned, and serium.

Q. There are other things, but you don't find the cadmium compound?

A. It is not mentioned here, no.

Q. And you did not check cadmium sulphide with respect to its effect upon flame coloring; is that not right?

A. That's right.

Q. And you did not check the iron salts that you use with respect to flame coloring, is that right?

A. I checked the iron salts. They had the tendency, but not much, of giving a sort of reddish hue to it.

Q. Therefore, they would be of no practical good for coloring the flame, is that right?

A. That's right, not for commercial purposes.

Q. Fredericks refers to water soluble salts, doesn't he?

A. I believe it does in certain cases.

(Testimony of Norbert C. H. Muench.)

Q. Are the iron salts that you use water soluble?

A. Not to any extent. [183]

Q. Is cadmium sulphide water soluble?

A. I don't think so.

Q. Continuing now on your Exhibit E-2, which I believe you testified was made to contain successively Orange Red 621, Blue No. 1, being a cobalt aluminate, (3) copper acetate, and (4) Brown C-59. Which of those four chemical compounds do you find mentioned in the Fredericks patent? Any of them?

A. There is copper mentioned.

Q. Any cadmium sulfo-selenide?

A. This blue has aluminum, and this calls it aluminate. This calls for aluminum.

Q. I understand Blue No. 1 to be cobalt aluminate. Do you find it in the Fredericks patent?

A. Cobalt—I don't find cobalt mentioned, but I do find aluminum mentioned.

Q. Do you find any combination—will aluminum color the wax?

A. No. But undoubtedly in combination with a cobalt it does.

Q. Therefore, cobalt aluminate means something different from aluminum, doesn't it?

A. Well, it is a mixture, yes, but it still has aluminum in it, as I understand it.

Q. But you don't find anything in Fredericks that [184] corresponds to cobalt aluminate, isn't that true?

A. No, but does Fredericks just limit himself to——

Q. Just a moment. I am asking the questions

(Testimony of Norbert C. H. Muench.)

for the time being. A. Okay.

Q. The answer to that is "No," am I not right?

A. Yes, cobalt is not mentioned.

Q. Now, if you will refer to the Fredericks patent, itself, you will find that Mr. Fredericks took particular pains to tell how his candle may be made in accordance with three examples. Do you recall, Mr. Muench, that he described what he called the single color type, then the alternate color type, and then the mixed color or multicolor type, on page 2, the first column?

A. Yes.

Q. I want to read Mr. Fredericks' description of the single color type, starting at line 6:

"If a candle burning with a red colored flame is desired, a wick similar to those now in use, or any suitable wicking, is first dipped into hot paraffine or other wax. Over this waxed wick is applied a continuous film or layer or other deposit of warm petrolatum by drawing the waxed wick through the petrolatum. The wick so prepared is now dipped in crystals of strontium chloride, so that a continuous attachment of the strontium chloride salt is made on one side of [185] of the wick, and in medium propositions for the full length of the wick."

I don't believe I need to encumber the record by reading the rest of it. He merely refers to building up the candle then.

Would a candle so made, whether or not it dripped, color the wax?

A. Whether or not it drips, will it color the wax?

Q. Right.

(Testimony of Norbert C. H. Muench.)

A. Do you mean only made with that particular salt?

Q. I mean a candle made according to the example that I just read.

A. With strontium chloride?

Q. Right.

A. No, it won't color it, because strontium chloride is white.

Q. Continuing with the alternate color type, starting at line 30:

"If a candle burning with alternate blue, followed by red, followed by yellow colors is desired, apply glycerol to the wick on one side for the length of the distance to which it is desired to burn the blue and red colored flames. Now dip the wick into cupric chloride crystals for the distance determined for the blue colored flame, and then dip the wick into the strontium chloride crystals onto that part of the [186] wick reserved for the red colored flame. Now dip the entire wick into melted paraffine, and so forth, so as to seal these salts, and the vehicle onto the wick. Now draw the paraffined remainder of the wick which has been reserved for the yellow color through a saturated glycerol and sodium chloride salt mixture, and dip the part of the wick on which has been applied the yellow burning metallic salt, into the paraffine, so as to seal in this last application. Now proceed to manufacture the candles in the regular manner, being careful that the last coating of paraffine has set sufficiently for safe handling of the wick."

(Testimony of Norbert C. H. Muench.)

Will that candle so made drip appreciably, even according to anything said by Fredericks?

A. Will it drip appreciably?

Q. Could you say for certain that it would drip any more than your regular standard candle, which as I understand it is an ordinary candle not specially designed for dripping, which corresponds to Plaintiff's Exhibit 14?

A. I would say it would, on accooount of the metallic salts that it contains, which would plug up the wick and cause it to drip.

Q. Sometimes these metallic salts snuff out the flame, don't they, as the candle is burning?

A. The reason being that if it is applied all the way around, yes. [187]

Q. Could you explain to me why it was necessary for Mr. Lyon to come up and re-ignite one of your candles this morning?

A. Because there was a decided draft here, and it hadn't had a chance to get started.

Q. Did you notice that the candle right alongside of it was burning?

A. Yes. But even so, a candle within a foot may go out. It is just like individuals, one person may do one thing and one person may do another. I have had candles that will burn within a foot of each other be differently affected by a draft.

Q. The fact of the matter is, is it not, Mr. Muench, that if you are going to try to incorporate on a wick enough of such a light-colored material as copper chloride, you are going to have to apply

(Testimony of Norbert C. H. Muench.)

a lot of it in relation to the quantity of dye that you would have to use; is that not right?

A. That's right. But you could also use a larger wick, too, to compensate for that.

Q. And if you used a larger wick you would be following the teachings of the prior art here, which is the only reference, namely, Funke, that refers to wicks; is that not right?

A. I don't quite understand that.

Q. Did not Mr. Funke say that one should use a wick [188] larger than ordinary, the part we read this morning?

A. He referred to what you might call a puffed up wick. It may not be a fully braided wick. It might be a loose cotton wick to absorb those metallic salts.

Q. He wanted enough wick area to carry his salts, didn't he?

A. Yes. But he didn't limit himself to a braided wick in that case. He may have used what is many times used with bayberry candles, just a heavy cotton strand like, a good deal like this knitting wool is in appearance. It has a great absorption ability.

Q. Would it not be at least as logical to use for any representation of Fredericks a wick of that sort, instead of a No. 9?

A. Certainly, because there is no limit to it, any more than there is in the Wilson patent. You could use a large wick in a Wilson candle, too.

Q. But the smaller wicks make the candle drip more profusely? A. That is right.

(Testimony of Norbert C. H. Muench.)

Q. Referring back to this No. 2 example of Fredericks, to remind you, he referred to cupric chloride, strontium chloride, and sodium chloride. Now, let's assume that that candle would form dripings, how many colors would it drip?

A. Well, at least one with the cupric chloride.

Q. As a matter of fact, that is all it would drip, wouldn't it?

A. Strontium chloride, I believe, is a white salt.

Q. It is a very white salt, and we can produce a sample if there is any question about.

A. Is white a color? If so, if it was with red wax it would drip white, wouldn't it?

Q. But does the patent say it is dripping onto red wax?

A. Isn't it mentioned some place there where the wax may be colored?

Q. He refers to the use of different colored waxes, does he not?

A. I believe he does. In that case, white on red would show as a color, wouldn't it?

Q. Show what color? A. White.

Q. Do you mean that strontium chloride would act like a dye?

A. Well, if it showed up white against red, it would certainly act as a dye, because it would show the color white.

Q. Did you ever try to do that?

A. No, I didn't. But I know if you spilled something white on a red or black background it certainly shows up in [190] contrast.

(Testimony of Norbert C. H. Muench.)

color producing metallic salt. While still warm, the wick is again drawn through warm petrolatum, and it is now dipped into strontium chloride crystals, so as to have a continuous attachment on one side of the wick, in medium amount, for the entire length of the wick, and on top of the blue color producing metallic salt. The entire wick is again dipped into melted paraffine to seal in this [193] last application of the red color producing metallic salt. The wick is then allowed to cool and set, or with care, one can immediately proceed to manufacture the candles in the regular manner."

Mr. Fredericks has not described that mixed color candle in the first place as a drip candle, has he?

A. As a drip, no.

Q. Now if it were a drip candle, how many colors would it drip?

A. Well, it would drip a bluish color with the cuperic chloride, the strontium chloride would drip white and—there isn't any third color mentioned there, is there?

The Court: Red, white and blue, it says.

The Witness: He might have used copper oxide, couldn't he?

Q. (By Mr. White): Did he say that he used copper oxide?

A. No, but he mentions that in the other part.

Q. Will you please confine your answers to my questions?

The Court: What is strontium chloride, is that white?

(Testimony of Norbert C. H. Muench.)

The Witness: That is white crystals.

He mentions a multi-drip mixed color and he only mentions two salts, there, doesn't he, Mr. White?

Mr. White: I believe you are right, Mr. Muench.

Q. Now he deposited the strontium chloride crystals on [194] top of the length of the wick to which he had applied the cuperic chloride, is that not right? A. That is the way it reads.

Q. Strontium chloride wouldn't affect the coloring produced by the cuperic chloride at all, would it?

A. I don't think so. It might be the other way around.

Q. So therefore we would have only a single color?

A. Judging that only two of them are mentioned and one is white.

Q. Referring to your exhibit I, I-1 and I-2, the British Field patent, I believe you testified, Mr. Muench, that such a candle even if it were a drip candle could not burn in any manner productive of successively formed different colored drippings, is that not right?

A. That is right. They would have a tendency to blend along the length of the handle.

Q. And the British Field patent says nothing about making any drip candles, is that right?

A. That is right. [195]

Q. We are in agreement that your Exhibit O, the rope candle, is not a multicolored drip candle?

(Testimony of Norbert C. H. Muench.)

A. Which candle was that?

Q. Your rope candle.

A. The 117 rope, no; that is a single core candle, single color.

Q. And the Star Pillar candle, Exhibit P, is not a multicolored drip candle?

Mr. Lyon: Do you mean Exhibit F?

Mr. White: Is it Exhibit F?

Mr. Lyon: Right.

Mr. White: I am sorry. Stand corrected on that.

The Witness: That is a single core, color candle.

The Court: What gauge is the wick in that one?

The Witness: That is about a 30-ply wick. The diameter of the candle is much larger.

The Court: Would that drip?

The Witness: That would drip, just like this (indicating). In fact, it would drip easier than this one, because of the star shape.

Mr. Lyon: I think we had better light it.

Q. (By Mr. White): You are referring now to Defendant's Exhibit H, a candle assertedly made according to the Hausamann patent.

The Court: He has just lighted Exhibit F. Mr. Lyon did. [196]

(The last question was read by the reporter.)

The Court: You are referring to what?

Mr. White: May I rephrase that?

The Court: Yes.

Mr. White: In reference now to Defendant's Exhibit H, a candle purportedly made according to the German Hausamann patent, as I recall your testi-

(Testimony of Norbert C. H. Muench.)

mony this is a candle made, using a 9-ply wick?

The Witness: Yes.

Q. (By Mr. White): Is there anything said in the Hausamann patent as to its being a drip candle?

A. No.

Q. Are there any multiple coloring materials in the candle?

A. No. One color at a time.

Q. And there is no concealment at the ends of the candle of even that color; is that not right?

A. It would have a tendency to show, although not necessarily so. It could be covered up by the white wax.

Q. Didn't Hausamann use the device primarily as a trade-mark to indicate——

A. I think he did as an identification.

Q. He wouldn't cover it up then, would he?

A. No, not necessarily so.

Q. Now, I am particularly concerned about your direct [197] testimony relating to Exhibit G, the Sterry British patent. I believe you testified, Mr. Muench, that in the preparation of that exhibit you ironed into the wick successively aniline blue, aniline pink, and aniline violet dyes; am I correct? This patent says nothing about forming drippings, am I not right?

A. No, it does not call for drippings.

Q. Does it say anything about ironing colors into the wick?

A. That is the way I read it some place in there.

The Court: That is the Sterry patent?

Mr. White: Yes, your Honor.

(Testimony of Norbert C. H. Muench.)

Mr. Lyon: I am reading the wrong patent.

Mr. White: If I may, I should like to read the very brief specification starting on page 3 at about line 10.

The Court: You mean you are leaving all this out about "Her most Excellent Majesty Queen Victoria"?

Mr. White: Yes, your Honor. "In order to get a pearly transparent character of candle it is at present necessary to use paraffine very free from color, the cost in preparing which is great. I find however that while using a comparatively cheap paraffine I can obtain a pearly white by simply employing in lieu of the ordinary wick a wick having a blue or violet color, which color subdues the cloudy character of the inferior paraffine and greatly enhances [198] the marketable value of the candle without deteriorating its illuminating property. The coloring of the wick may be effected by dying the same, or printing or coating the wick with the appropriate or desired color or shade.

"When it is desired to give the candle a tinted hue, such, for example, as pink, I prepare the wick of the required color, and by its use a corresponding but subdued tint will appear to be diffused through the moulded material of the candle.

"The Invention is applicable not only where inferior paraffine or other inferior semi-transparent material is used, but also where the best qualities of these materials are employed, as their appearance is thereby enhanced, though not perhaps in the

(Testimony of Norbert C. H. Muench.)

same proportion as when materials of an inferior color are used in the manufacture of candles. In coloring the wicks I prefer to tint only those parts which are intended to be embedded in the paraffine or other semi-transparent material, leaving white the exposed ends. Various modes may be adopted for imparting the color. Thus for example a length of plaited wick may be passed down to and between a pair of printing rollers mounted in a vessel containing the dye liquor and rotating in contact with that liquor. A tube standing upwards through the liquor in a line with the nip of the rollers will receive the wick as it leaves the printing rollers and pass it out through the bottom of the vessel. To provide for the partial printing of the wick the shafts of the rollers may be severally provided with a cam piece or cam pieces, which as the rollers rotate will come into contact and force the rollers apart, thus leaving the wick to which a continuous motion (independent of the printing rollers), is given to pass on for a given distance, say two or three inches without any color being imparted thereto. As the wick leaves the dye vessel it may be dried by being passed over a steam heated roller or in any other convenient manner. The dye which I prefer to use for imparting the pearly lustre to candles is a solution of aniline blue or violet, being the color required for this purpose. I do not propose to confine myself to the use of aniline colors but in general they will be preferred, as they offer no difficulty to the proper burning of the wick. The

(Testimony of Norbert C. H. Muench.)

colors and tints employed may vary according to taste.

Now, this patentee was not concerned even with coloring the flame, was he, Mr. Muench?

The Witness: No, sir. [200]

Q. In the preparation of your Exhibit G, you find your candle to be tinted by the coloring in the wick?

A. It is most logical that it would be tinted.

Q. But is it? A. Yes, it is.

Q. Is that the dye on the wick that we see on the outside of that candle?

A. Yes, that is bled through.

Q. Does that candle have a pearly luster?

A. Some people might call that a pearly luster.

The Court: Black pearl?

The Witness: Something like that. It is sort of a bluish pearl. Pearlescent, you might call it.

Q. (By Mr. White): Now where in the Sterry patent, Mr. Muench, do you find any reference to coating the wick successively with blue, pink and violet aniline dyes?

A. I combined the three in the one candle. It does not mention it in the patent that they use more than one color at a time, but it mentions the three of them as using any or all of them, I take it.

The Court: Is there not another candle that was partially burned that was built after the teachings of this patent?

(The exhibit referred to was passed to the court.) [201]

(Testimony of Norbert C. H. Muench.)

Q. (By Mr. White): Therefore as that exhibit is made it does not correspond to the description in the Sterry patent, is that not right?

The Court: What exhibit does the witness have?

Mr. White: G.

The Witness: This is a similar candle.

The Court: No, this is G.

Mr. White: I understood that he was looking at a duplicate, your Honor.

Mr. Lyon: This is not an exhibit, your Honor; it is just another candle we prepared in accordance with the teachings of the patent.

The Court: That is not Exhibit G.

Mr. White: I want Exhibit G.

The Court: This is the one. This one has not anything on the outside except the drippings.

The Witness: That is right. That is a fresher candle. That is a newer candle.

Mr. White: May I examine it a minute, your Honor?

(The exhibit referred to was passed to counsel.)

The Court: You had better ask him over again because he was talking about another Exhibit G.

The Witness: That one in Mr. Lyon's hand is with one color on the wick, blue. [202]

Q. (By Mr. White): Would that not be more in keeping with the teachings of the patent than what I have in my hand?

A. In that it only has one color, yes.

(Testimony of Norbert C. H. Muench.)

Mr. White: May we have that in evidence, please?

Mr. Lyon: That is agreeable.

The Court: We will call that G-2.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit G-2.)

Q. (By Mr. White): The one I hold in my hand does not correspond with any description in the Sterry patent, is that not right?

A. If you are referring to the three colors——

Q. Right. A. That is right.

The Court: You were talking about ironing it. He read the specifications here.

The Witness: I used the word "iron." I could have possibly used the word "roller" too but I pressed it.

The Court: To steam-heat the color? In other words, you take that to mean an ironing or pressing?

The Witness: Yes.

The Court: And that was for the purpose of drying it, is that right?

The Witness: Yes, to get it in and dry it. [203]

The Court: Very well.

Mr. Lyon: We have had a candle going here in evidence without much in the way of identification of it.

The Court: Well, G-2, the record will show that the witness has testified that it is a candle manufactured by the defendant following the teachings of his concept of the teachings of the Sterry patent

(Testimony of Norbert C. H. Muench.)

and that there was only one color used in the wick and that was blue.

Mr. Lyon: That was aniline blue.

The Witness : Aniline blue.

Mr. Lyon: How many ply in the wick?

The Witness: I think that was a 30-ply.

The Court: I wonder if we might have another short recess. I have a telephone call to make.

(Short recess.)

Mr. Lyon: If the court please, I think the Star Pillar candle has burned enough so may we blow it out?

The Court: I have no objection if none of the parties **do**.

Very well: Proceed.

Mr. White: Your Honor, Plaintiff's Exhibit 4-C has suffered another accident. The built-up drippings have now been ingloriously dropped to the bottom.

With the court's permission we would like to replace that exhibit or at least have in the record along with it [204] another correspondingly burned candle.

The Court: If there is no objection you can just take this out and put another one in and burn it down.

The Clerk: This candle is the same thing.

The Court: Let us move this exhibit over on the other candle and light it.

The Clerk: This was so loose and they have tightened up the other one.

(Testimony of Norbert C. H. Muench.)

The Court: Let us light this one and put it over here now.

Mr. White: I should like to read now into the record the remainder of the plaintiff's interrogatories and the defendants' answers to them and perhaps question the witness in connection with certain of them.

The Court: Question this witness?

Mr. White: Yes.

The Court: Very well.

Cross Examination—(Continued)

Q. (By Mr. White): Mr. Muench, Interrogatory I had described a drip candle in this language:

“A drip candle having a wax body and containing within its interior different wax-soluble dyes at different locations longitudinally of the body, the different dyes being concealed within the [205] candle body and being undissolved in any substantial portion of the body wax before the candle is burned, the dyes dissolving in the said portion of the body wax as the candle burns with resultant formation of a composite of different colored drippings as the candle progressively burns.” Question No. 3 is this:

“Identify all publications prior to March 13, 1945, upon which defendant will rely, which individually disclose a candle as defined in Interrogatory 1, and in so doing state specifically by reference to page and line numbers where such disclo-

(Testimony of Norbert C. H. Muench.)

sure is contained in any publication identified in response hereto."

Answer:

"U. S. letters patent to Nelson 1,908,044 and U.S. letters patent to Fredericks 2,184,666."

The absence in that answer to any reference to page and line numbers is because you are unable to find any specific reference which you could make by giving me page and line numbers which would so describe a candle, is that not right?

Mr. Lyon: I object to that. You are perfectly aware of the fact that the answer to Interrogatory No. 12, that the witness has stated that the entire specification——

Mr. White: I object to any objection on [206] your part, counsel, that is not predicated upon the propriety of my question as confined to Interrogatory No. 3, and I asked for reference to page and line numbers and I believe I am entitled to ask the witness why I did not get them.

The Court: I think that is right. The objection is overruled.

The Witness: Will you ask that question again, please, Mr. White?

The Court: Do not read the whole question, just the question part of it.

(The question referred to was read by the reporter as follows:

("The absence in that answer to any reference to page and line numbers is because you are unable to find any specific reference which

(Testimony of Norbert C. H. Muench.)

you could make by giving me page and line numbers which would so describe a candle, is that not right.")

The Witness: Well, you mention a candle. I don't know what kind of a candle you mean there. Do you mean a drip candle or a colored flame candle?

Q. (By Mr. White): Are you looking at a copy of these interrogatories? A. Yes, sir.

Q. Will you refer back to Question No. 1 in which my definition of a drip candle is contained? That is what we are [207] talking about.

A. A drip candle? [208]

Q. Right.

A. You want to know whether a drip candle is referred to in either of those two patents?

Q. I want to know whether you can give me the page and line numbers where either of those patents disclose a candle as I have defined it in interrogatory 1.

The Court: Mr. Lyon, what are you doing?

Mr. Lyon. I am showing him the interrogatories.

The Court: He has the interrogatories before him. He has a copy.

The Witness: Well, I can't give you the line, because the whole patent, as I see it, read upon a drip candle there.

Q. (By Mr. White): Isn't it true, Mr. Muench, you can't give me the page and line number because they are not there?

A. I would say that the whole patent as such

(Testimony of Norbert C. H. Muench.)

reads on it. So if I took out part of it—It forms a candle with successive colors, and the candles drip much better than they burn with a flame, colored flame.

Q. Mr. Muench, I don't want to appear argumentative, that is not my purpose; I merely want reference to page and line numbers in the Nelson and Frederick patents where there is disclosed a candle as I have defined it in interrogatory 1.

The Court: I think he has answered it. He said in his opinion the whole patent describes that kind of a candle. [209]

Q. (By Mr. White): That, however, is a conclusion, is it not——

The Court: Quite obviously. All he is doing is expressing his opinion.

The Witness: If I pick anything out of the whole thing, it would be taking it out of context. I can't do that.

Q. (By Mr. White): The Fredericks and Nelson patents you have interpreted as describing what you have made in your exhibits, is that not right?

A. Yes, I tried to follow to the best of my ability what I considered the description of the candles.

Q. I think I am entitled to this bit of information, for you to show me, by referring to where in the Fredericks patent any description is contained of the candle as you have made it. And I am now talking about your Exhibits E and E-2.

The Court: That is the Fredericks patent?

(Testimony of Norbert C. H. Muench.)

Mr. White: That is the Fredericks patent.

The Court: What do you want to know now? What are you asking him?

Mr. White: He has described to us the making of a drip candle containing certain coloring materials. Now I want to know where in the Fredericks patent you find anything of that sort described in terms that would direct anyone to make the candle as you have made it.

The Witness: Do you mean where I said that I dipped the [210] wick into melted petrolatum, and those things?

Q. (By Mr. White): No. I am talking about coloring, and I am talking about dripping. Now, those are the essential things that go into this candle. I want to know right where Fredericks told you to do what you did in making your exhibits.

A. As I read it, I wrote it down as I made the candles. Now——

Q. Did you copy from Fredericks?

A. I interpreted according to the notes I read before, as I made the candles.

Q. All right. Let's call it an interpretation then. What did you specifically interpret as meaning what you have shown us here in your exhibits?

A. I interpreted the matter of the method of making the candles.

Q. Now, where is that referred to in this Fredericks patent?

A. It looks as though most of the context of the Fredericks patent tells you how to make it, and

(Testimony of Norbert C. H. Muench.)

it lists several other points in regard to certain salts.

Q. All right. Where do you find in the Fredericks patent those certain salts?

A. Well, these salts here that I used are possibly modifications of those, but they are basically on that basis. [211] For instance——

Q. Do you mean they are chemically similar?

A. Yes.

Q. Do I understand that you are not qualified as a chemist?

A. That's right. For instance, here in the list that I gave you on colors, copper acetate is listed in the Fredericks patent, calcium acetate is listed.

Q. Did you use calcium acetate?

A. No, I didn't. I used copper acetate, and I used a copper nitrate.

Q. Did you use copper nitrate? A. Yes.

Q. In what exhibit?

A. Wait a minute. In the first—I don't remember what those exhibits are numbered. It was the first candle that was put in evidence using copper acetate, iron salts, copper chloride.

Q. You used copper chloride and not copper nitrate, is that correct?

A. Yes. But copper nitrate is listed as being permissible to use.

Q. I think we have agreed that you can't find the rest of it in the Fredericks patent, and here I am talking about the dripping and the presence of cadmium sulphide or even [212] spinel.

(Testimony of Norbert C. H. Muench.)

A. Ferric means iron, doesn't it? Ferrous is an iron metal, and ferric acetate is listed.

Q. Did you use them? A. Ferric hydrate.

Q. Did you use them?

A. I used the iron salt with the long name that I gave you. Which certainly is made of iron, because it is listed as iron salts. Which type of ferric salts it is, I can't say from this name. Maybe some chemist could. I can't even pronounce the name.

Mr. White: I feel that we are getting nowhere fast with this line of examination, and to shorten it, I want to state for the record that I had asked for reference to page and line numbers concerning a candle as identified in interrogatory No. 1. You have not supplied it, and I say for the purpose of the record, and as I believe can be borne out by reference to the Fredericks patent itself, such is not in the patent.

The Court: Well, that is for you and Mr. Lyon to argue about.

Mr. White: Right. And the same observation applies to Nelson.

The Court: As far as this witness is concerned, his opinion is, if I understand what he desires his testimony to be—or let me put it this way: That I understand that he [213] desires his testimony to be, in effect, as I understood it, that in his opinion all of the Nelson patent and all of the Fredericks patent read on claim 1 of the Wilson patent.

(Testimony of Norbert C. H. Muench.)

Is that it?

The Witness: Yes, sir.

Mr. White: And I interpret his answer to be based only on opinion and not fact. [214]

Mr. White: Question No. 4:

“Identify all publications prior to March 13, 1945, upon which defendant will rely, which individually disclose a candle as defined in Interrogatory 1, and in so doing state specifically where by reference to page and line numbers where such disclosure is contained in any publication identified in response hereto.

“Answer: U. S. Letters Patent to Nelson 1,908,-044 and U. S. Letters Patent to Fredericks 2,184,-666.”

Q. Here again the question called for reference to page and line numbers, and may I take it to be your position and answer, Mr. Muench, that you include the patents as a whole to so disclose a candle defined in Question 2? A. Yes.

Q. That that is your opinion?

A. Yes, the same as I had on the other one, in the first interrogatory.

Mr. White: And in contemplation of argument on this point I believe that the court might be interested in any such reference if it does exist.

“Question 11: (a) Does defendant contend that a candle made according to any of the descriptions or examples given in the Funke patent 1,701,844, at [215] lines 29 to 93, will upon burning form, successively and to any considerable extent, on the

(Testimony of Norbert C. H. Muench.)

body of the candle different colored drippings colored differently from the candle body?

“(b) If the answer to the foregoing is in the affirmative, designate specifically wherein the stated portion of the Funke patent describes a candle which is so operative in fact.

“Answer: (a) No.

“(b) No answer required.

“Question 12: (a) Does defendant contend that a candle made according to any of the specified description or examples given in the Fredericks patent 2,184,666 on page 2, lines 5 to 75 of column 1, and lines 1 to 65 of column 2, will upon burning form successively and to any considerable extent on the body of the candle different colored drippings colored differently from the candle body?”

The Court: The answer to that?

Mr. White: The answer to that is “yes.”

Q. Wherein is that disclosure? Would you care to quote to me the words, Mr. Muench?

A. Well, the specifications, the way they read to me show, here is a candle that you are putting salts in as described by Fredericks into the body of the candle that isn't [216] consumable in the wick, there is no place for it to go but to drip.

Q. Just a moment. Do we both understand the question?

I laid out in reference to lines a certain section of the Fredericks patent, and my question is merely to ask you to read that portion within that delineation that does so describe the candle.

(Testimony of Norbert C. H. Muench.)

A. I thought we had taken care of that. I can't take any part of it out without going to the rest of it, as I see it, Mr. White.

Q. Very well.

The Court: Well, your answer is that the entire specifications of the Fredericks patent discloses a candle which upon burning will form successively on the body of the candle different colored drippings colored differently from the candle body?

The Witness: Yes, sir.

The Court: In other words, that is your answer, your opinion and your position?

The Witness: Yes, sir. It cannot be any other place.

The Court: Let us get on, counsel.

Mr. White: Question 12:

“(b) If the answer to the foregoing is in the affirmative, designate specifically wherein the stated portions of the Nelson patent describes a [217] candle which is so operative in fact.”

The answer to that:

“The entire specification of the Nelson patent discloses a candle which upon burning will form successively on the body of the candle different colored drippings colored differently from the candle body.

Question 12 (c):

“In further reference to the Fredericks patent, does strontium chloride significantly change the color of white candle wax by admixture therewith?”

(Testimony of Norbert C. H. Muench.)

“Answer: (c) No, as strontium chloride is white.”

I should like to move that the remainder of the answer be stricken, which is, “Strontium bromate, Strontium nitrate——”

The Court:: You do not have to strike it. If you do not want to read it in the record it is not in the record.

Mr. Lyon: I submit that the whole of the answer should go in if any of it goes in.

Mr. White: Obviously it is an attempt to aggrandize an otherwise hopeless answer by talking about something else that I didn't ask about.

The Court: Very well. If you do not care [218] to read it, it is not in the record. Go ahead.

Mr. White: Question 12 (d):

“Does defendant contend that cupric chloride is an effective and satisfactory material for use in white drip candles to color their drippings?”

“Answer: (d) Yes.

“Question 12: (c) Does cadmium chloride significantly change the color of white candle wax by admixture therewith?”

“Answer: (c) No, because the crystals are again white.”

Now Question 13:

“(a) Does defendant contend that a candle made according to any of the descriptions or examples given in the Nelson patent 1,908,044, at lines 84 to 100 on page 1, and lines 1 to 15 on page 2, will upon burning form successively and to any considerable

(Testimony of Norbert C. H. Muench.)

extent on the body of the candle different colored drippings colored differently from the candle body?

“Answer: (a) Yes.”

Q. In connection with that answer, Mr. Muench, I believe that your intended answer is that it is your conclusion that the Nelson patent in its entirety teaches that? A. Yes, sir. [219]

Q. And you have not undertaken to answer only in reference to what I had delineated in the question, is that not right?

A. I think the whole patent is dependent upon each part of the other.

Mr. White: Question 13:

“(b) If the answer to the foregoing is in the affirmative, designate specifically wherein the stated portion of the Nelson patent describes a candle which is so operative in fact.

“Answer: (b) The entire specification of the Nelson patent discloses a candle which upon burning will form successively on the body of the candle different colored drippings colored differently from the candle body.”

The Court: Is it agreeable now that this substituted candle be blown out, Exhibit 4-C?

Mr. White: Yes, your Honor.

Mr. Lyon: Yes.

The Court: Let the record show I have done so.

Mr. White: I will omit Question 14 only for the reason that the testimony here I think has served the purpose of identifying the British Field patent.

(Testimony of Norbert C. H. Muench.)

“Question 17: Does defendant contend that candles as made according to the Funke, Nelson [220] and Fredericks patents referred to in Interrogatories 11 through 13, will upon burning produce coloring of their flames as represented by the patentees that the flames will be colored?

“Answer: To some extent, yes.”

Q. Our performance of burning here indicated, Mr. Muench, that the flames gave an occasional color spit, is that not right?

A. Yes, partially.

Q. And is that what the patentee said they would do?

A. No, they possibly claimed a lot more color for them but so far as our tests showed it was only a partial coloring of the flame.

Mr. White: Question 18:

“Designate which of the following compounds defendant knows to be available from suppliers and capable of practical and workable use in the making of candles like or similar to defendant’s ‘Make-a-Rainbow’ or ‘Cascade’ candles, and for the effective coloring of drippings produced upon burning of the candles.”

With the court’s permission, in order to shorten time here, would it be satisfactory for the reporter to copy these lists of chemicals in?

The Court: Yes. You can read the answer. [221]

(Reporter’s note: The list of chemicals referred to is, in words and figures as follows, to wit:)

(Testimony of Norbert C. H. Muench.)

Chlorides of:	Nitrates of:	Nitrates of:
sodium	sodium	sodium
potassium	potassium	potassium
lithium	lithium	lithium
boron	boron	boron
thorium	thorium	thorium
strontium	strontium	strontium
iron	iron	iron
copper	copper	copper
calcium	calcium	calcium
barium	barium	barium
cerium	cerium	cerium
zinc	zinc	zinc

Acetates of:	Oxysalts of:	Ammoniates of:
sodium	sodium	sodium
potassium	potassium	potassium
lithium	lithium	lithium
boron	boron	boron
thorium	thorium	thorium
strontium	strontium	strontium
iron	iron	iron
copper	copper	copper
calcium	calcium	calcium
barium	barium	barium
cerium	cerium	cerium
zinc	zinc	zinc

Chlorates of:	Perchlorates of:	Alcoholates of:
sodium	sodium	sodium
potassium	potassium	potassium
lithium	lithium	lithium
boron	boron	boron
thorium	thorium	thorium
strontium	strontium	strontium
iron	iron	iron
copper	copper	copper
calcium	calcium	calcium

(Testimony of Norbert C. H. Muench.)

barium
cerium
zinc

barium
cerium
zinc

barium
cerium
zinc

Oxides of:

sodium
potassium
lithium
boron
thorium
strontium
iron
copper
calcium
barium
cerium
zinc

Sulphates of:

sodium
potassium
lithium
boron
thorium
strontium
iron
copper
calcium
barium
cerium
zinc

Hydroxides of:

sodium
potassium
lithium
boron
thorium
strontium
iron
copper
calcium
barium
cerium
zinc

Metals

Powdered aluminum

Powdered magnesium

Mr. White: The answer——

The Court: Why not let the reporter copy in the answer too? It is rather long and I have read it.

Is that agreeable?

Mr. Lyon: That is agreeable.

Mr. White: Yes.

(The answer referred to is, in words and figures, as follows, to wit:)

“Answer: Defendant is informed that the following compounds can be used to color wax drippings of a candle: [224]

Toluidine—Red

Barium Chromate—Yellow

(Testimony of Norbert C. H. Muench.)

Sodium Silicate and Aluminum — Ultramarine Blue

Uranium Dioxide—Black

Benzene Sulfonate of Sodium—Methyl Orange

Copper Acetate—Green (Bluish)

Calcium Acetate—Gray

Ferrie Acetate—Red Powder

Zinc Acetate—In combination with Alizarin Blue

Copper Nitrate—Blue

Copper Oxide—Red

Copper Stearate—Light Blue

Copper Sulfate—Blue Vitrol

Copper Hydroxide—Blue

Ferrie Ammonium Sulfate—Lilac

Ferrie Hydroxide—in combination with oil creates a brown

Ferrie Nitrate—in mixture with stearic—Violet

Ferrie Oxide—Red (Prussian Red)

Ferrocyanide Salt—Prussian Blue known as Iron Blue, also Chinese Blue.

The Court: Now you want to ask the witness a question?

Mr. White: Yes, thank you.

Q. Mr. Muench, that list of compounds and materials [225] which you see on pages 11 and 12 represent the compounds and materials referred to in the Nelson and Fredericks patents, is that not right?

A. I take it that is true basically on the way you have it on those two pages.

Q. And all together they number 146, is that not right?

(Testimony of Norbert C. H. Muench.)

Mr. Lyon: I don't see any mention there of selenium in any of that. Maybe it is there. I just don't see it.

Mr. White: Has selenium been used by the defendant in the preparation of any exhibits under the Nelson, Fredericks and Funke patents?

Mr. Lyon: I understand so.

The Witness: In the orange red 621 it is listed as a combination of cadmium, sulfo and selenide.

The Court: In what?

The Witness: In what I used in the Fredericks patent, the orange red 621. It is manufactured from cadmium sulfo selenides.

Q. (By Mr. White): And we have established that that compound as such was not mentioned in Nelson or Fredericks' patents.

The Witness: As a compound.

Mr. Lyon: This establishes just what it does say. It calls for salts of selenium. [226]

Mr. White: Correct.

Mr. Lyon: And you haven't listed any salt of selenium in this interrogatory.

Mr. White: If it is absent from the interrogatory is was purely an oversight.

Where do we have reference to selenium in the Nelson or Fredericks patents?

Mr. Lyon: I will show you.

The Court: On the Nelson patent it is in column 1, line 49, selenium salts produce a light blue flame. In the Fredericks I do not know.

Mr. Lyon: It is not in the Fredericks

(Testimony of Norbert C. H. Muench.)

Mr. White: This list should have included selenium salts.

The Court: Then I take it your question is whether or not selenium salts is available from suppliers and capable of practical and workable use in the making of candles like or similar to the defendant's "Make-a-Rainbow" or "Cascade" candles and for the effective coloring of drippings produced upon burning of the candles.

Did you hear that question?

The Witness: Yes.

The Court: Is it?

The Witness: Yes.

The Court: Very well. [227]

Q. (By Mr. White): Now, as to the remaining compounds listed on pages 11 and 12 of the interrogatory answers, I would like to refer to the answer on page 13: "Defendant is informed that the following compounds can be used to color wax drippings of a candle: toluidine"—do you find toluidine included in any of the materials listed on pages 11 and 12?

A. A lot of those came out of this condensed chemical dictionary by Reinhold. Shall I look up toluidine and see what he says about it?

Q. Well, you have recently answered the interrogatory, have you not?

A. Yes. But I can't remember—

The Court: He can't remember that. He can have reference to a reference work. What is it?

The Witness: Toluidine—

(Testimony of Norbert C. H. Muench.)

The Court: What is your reference work?

The Witness: Condensed Chemical Dictionary, Fourth Edition, by Reinhold.

The Court: Published by—

The Witness: Published by Reinhold Publishing Company in 1950, 330 West 42nd Street, New York City.

The Court: All right. Now, is toluidine a chloride, or nitrate, or acetate, or oxy salt, or ammoniate, or chlorate, or perchlorate, or alcoholate, or oxide, or sulphide, or [228] hydroxide, of anything?

Mr. Lyon: Do you know?

The Witness: Only what it says there.

The Court: You can have reference to your book.

Mr. Lyon: It gives a chemical formula in here, your Honor. $\text{CH}_3\text{C}_6\text{H}_4\text{NH}_2$. Now, NH_2 is an ammonium radical. I am not enough of a chemist, but it would indicate to me that might be an ammoniate.

The Court: All right.

I take it you are going to go down the list with this witness on all of these and ask him whether or not they come in any of these categories?

Mr. White: I think I can do it very briefly, your Honor.

The Court: I think you can do it more briefly in the morning after the witness has a chance to look these up, inasmuch as you are telegraphing blows.

We are now recessed until 10:00 a.m. tomorrow. It may be possible that I will not be able to devote

the whole morning to this, but I won't know until tomorrow. Recess to 10:00 a.m. tomorrow.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken to 10:00 o'clock a.m., Thursday, March 22, 1956.) [229]

The Court: Any ex parte matters?

The Clerk: No, your Honor.

The Court: Proceed.

Mr. Lyon: If the court please, after adjournment last night we huddled with the learned textbooks and it appears that the answer to Interrogatory No. 18 we should probably not have included toluidine, red, as it appears that it is more related to the aniline type dye.

The Court: You should not have included what, toluidine?

Mr. Lyon: Put it this way: We are willing to stipulate that it may be stricken from that answer if Mr. White wishes.

The Court: That what may? I did not hear it.

Mr. Lyon: Toluidine, red.

The Court: That that may be stricken? Is that stipulation acceptable?

Mr. White: Yes, your Honor.

The Court: Very well.

Mr. Lyon: Yes, your Honor.

The Court: Is it agreeable if I just draw a line through toluidine, red, in the original?

Mr. Lyon: Yes, sir.

Mr. White: Yes.

The Court: And initial it. [233]

Mr. Lyon: I will do the same on our copy.

NORBERT C. H. MUENCH

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. White): Mr. Muench, we have just deleted toluidine from your answer in Interrogatory 18.

We come next to barium chromate. Do you find in either the Nelson or Fredericks patents reference to any chromates?

A. No, but barium is listed.

Q. But you do not find any chromates?

A. No, sir.

Q. Chromium is a metal as well as barium is a metal, is that not right? A. Yes, sir.

Q. Where in either the Nelson or Fredericks patents do you find reference to a silicate in the third compound appearing in your answer, where you say sodium silicate and aluminum? Where in either of those patents do you find a reference to a silicate?

A. Silicate is not listed but sodium is.

Q. Silica is a metal as well as sodium, is it not?

A. Yes, sir.

Q. And those patents represent that metals are supposed [234] to produce flame coloring, do they not?

A. Yes, but I didn't know that he was expected to mention all the metals.

Q. If you will please confine your answers to my questions.

(Testimony of Norbert C. H. Muench.)

The material there designated also includes aluminum. Will aluminum color a wax?

A. Aluminum possibly will—or, color wax? No, except that it will give it a sort of a silvery sheen.

Q. Will it dissolve in wax? A. No.

Q. Do not the materials which you use to color your candles dissolve in wax?

A. Not all of them. We use Prussian blue which does not entirely dissolve in the wax.

Q. The dyes that you use in your Make-a-Rainbow candle do, don't they?

A. Will you state that again?

Q. The dyes which you use in your Make-a-Rainbow candles dissolve in wax, don't they?

A. Most of them, yes.

Q. Now we come to uranium dioxide. Where in either of the Nelson or Fredericks patents do you find reference to uranium?

A. Uranium is not listed by oxides are. [235]

Q. Will you please confine your answers to my questions?

Do you find uranium referred to in either patent?

A. No, sir.

Q. We now come to benzene sulfonate of sodium. Do you have any reference in either Nelson or Fredericks to any benzene sulfonate?

A. No, sir. [236]

Q. Do you contend this to be a compound of sodium?

A. Well, I would say yes, from my layman's approach.

(Testimony of Norbert C. H. Muench.)

Q. Do all sodium compounds color wax?

A. I would say yes, because sodium has a tendency to color yellow.

Q. Have you ever mixed sodium chloride with wax? A. No, sir.

Q. Table salt, you have never mixed with wax?

A. Well, frankly, I never did.

Q. What do you think would happen if you mixed table salt with wax?

A. It would have a tendency to cause a yellowish flame slightly, I would say. But that is an estimate. I never mixed table salt with wax.

Q. I didn't ask you, Mr. Muench, what it would do to the flame; I asked you what it would do to the color of the wax? White sodium chloride.

A. White salts would not color any white wax of any type.

Q. At about line 15 we find reference to——

Mr. Lyon: Why do you skip the next five or six that you know he can find in the patent?

Mr. White: I will give you credit for those out of 146, which I have set forth in my question. To answer your question, I will give you credit for having come forth with 10 [237] out of 146.

Q. (By Mr. White): We come now to copper stearate; do you find reference in either Fredericks or Nelson to any stearate? A. No.

Q. Below we come to ferric ammonium sulphate; do you find reference in either Fredericks or Nelson to any ferric ammonium compounds?

A. Ferric means iron, of course, I am inclined

(Testimony of Norbert C. H. Muench.)

to think that it does mention ferric ammonium sulphate. Whether by that name or a combination, I am not sure. Possibly you having studied it may be able to enlighten me on that.

Q. Does ferric ammonium sulphate produce the same color, does it have the same color as ferric sulphate?

A. I imagine the ammonium adds something to it.

Q. I imagine so.

Now, we come to ferric hydroxide in combination with oil; does either Nelson or Fredericks say anything about ferric hydroxide in combination with oil?

A. I believe it only mentions the ferric hydroxide, but not the combination with oil.

Q. Last on the list we come to ferrocyanide; do you find any reference in Nelson or Fredericks to any ferrocyanide, or any cyanide compounds?

A. No cyanide. It mentions potassium and iron, but no [238] cyanide.

Q. So am I not correct in saying that you have included in your answer those compounds which I have specifically referred to in the preceding questions gratuitously and without having any reference to them in the Nelson and Fredericks patents?

A. Well, that is true, Mr. White. When I made up this list, I was looking for salts that would color the wax and drip down due to its being a metallic salt. I do know, for instance, prussian blue there, which apparently ferrocyanide salt is — prussian

(Testimony of Norbert C. H. Muench.)

blue is an old coloring agent used by candle people for many years.

Q. Therefore, if Nelson or Fredericks had intended to color their way, they probably would have mentioned prussian blue; is that not right?

A. Yes. They probably weren't out to primarily color their wax. They certainly must have known that those candles dripped, though.

Q. They certainly must have known that those compounds existed, too; is that not a logical supposition?

The Court: Isn't that argumentative, counsel?

Mr. White: Yes, your Honor.

The Court: How would this witness know what they knew?

Mr. White: Yes, your Honor, it is. [239]

Q. (By Mr. White): Now, Mr. Muench, did you find all these compounds that we have been talking about in Syracuse? A. These here?

Q. Yes.

A. No, sir. I didn't find them all there. As you said yesterday, maybe if I would have taken a trip to New York I would have found them.

Q. Well, you went outside of Syracuse to get those compounds, did you not?

A. I got them through local agencies.

Q. And did you make inquiry through local agencies for the other compounds which you yesterday testified were not available around Syracuse?

A. I tried to get them there. Had I known the way this would work out, I certainly would have

(Testimony of Norbert C. H. Muench.)

gone out further than Syracuse to buy them. As you said, they undoubtedly are available.

Q. Reading now into the record interrogatory 19—

Mr. Lyon: Do you want to put in the rest of interrogatory 18?

Mr. White: I understand, counsel, that the reporter copied that full question and answer into the record as per our understanding of yesterday.

Mr. Lyon: Okay.

Q. (By Mr. White): 19. "Which of such coloring [240] compounds as defendant may list in answer to interrogatory 17, has defendant actually used in either its Make-a-Rainbow or Cascade or any other similar commercially sold candles?

"A. Copper acetate."

Mr. Lyon: Excuse me, Mr. White. He did not copy into the record the paragraph beginning at line 25 on page 13 and concluding at line 29.

Mr. White: It was my understanding that the entire answer was to be copied. So to make the record complete, we will now read the last paragraph of the answer to interrogatory 18:

"Whether each of these is available commercially, we cannot say. Certainly copper, calcium, iron and zinc acetates are. Copper and iron oxides, copper chloride, copper and iron sulphates, copper and iron hydroxides and copper and iron nitrates are."

Q. (By Mr. White): Now, Mr. Muench, why the emphasis on copper?

A. Well, copper just happens to be a good one.

(Testimony of Norbert C. H. Muench.)

You don't go out and pick one that isn't any good, like the selenium. You might pick that, but I would pick copper.

Q. As a matter of fact, in your exhibits which are alleged to follow Nelson and Fredericks, copper compounds are the only ones you have used that have been referred to in those patents; is that not right? [241]

A. We may have emphasized the copper because we were used to it in our candle business.

Q. Just a moment. Is that not right, copper compounds are the only ones that you use in those exhibits?

Mr. Lyon: I object to that. There is iron salts in one of those exhibits.

Q. (By Mr. White): Do the iron salts that were used— Are we not referring to the spinel?

Mr. Lyon: Ask the question of the witness.

Q. (By Mr. White): Mr. Muench, when we come to the iron compounds used in your exhibits representing the Nelson and Frederick's patents, were not the iron compounds spinels?

A. No. This one with the long name, which I don't believe anybody can pronounce, I do not believe is a spinel.

Q. Was that found in Nelson or Fredericks?

A. By that long name? No; it is an iron salt. If you carried back to just basic iron, cadmium, selenium, and so forth, most of these salts have developed so that these drug houses, dye outfits, have

(Testimony of Norbert C. H. Muench.)

combinations. They make them up, and that is the way we have to buy them. [242]

Q. Those were not developed at the time of Nelson and Fredericks, were they?

A. I wouldn't know.

Q. I am talking about things that Nelson and Fredericks actually mentioned.

Now do all iron compounds behave similarly so far as coloring wax is concerned?

A. I would think so, Mr. White. Of course I haven't tried out all iron compounds.

Q. Well, then, for the purpose of your exhibit why didn't you use one that was named in the Nelson or Fredericks patents instead of going to this long involved organic compound?

A. Well, it just so happened that when we looked for it this one turned up. It is like going into a restaurant and taking what is on the menu.

Q. Certainly around Syracuse there is plenty of iron oxide, isn't there?

A. Well, maybe there is. I couldn't answer that for sure. Possibly anyplace there is a lot of iron oxide.

Q. And probably a lot of iron hydroxide?

A. Possibly.

Q. Probably some iron chloride?

A. Possibly.

Q. Far more usual compounds than the iron compound [243] that you used in the preparation of the Nelson and Fredericks exhibits, they are much more common, aren't they?

(Testimony of Norbert C. H. Muench.)

A. But isn't this an iron compound——

Q. Are they not much more common, Mr. Muench?

A. Well, if you say so I will go along with you, but I don't know exactly how common any of them are.

Q. Going back to this final paragraph in the answer to Interrogatory 18.

In your examples allegedly representing Nelson and Fredericks you employed, did you not, copper chloride and copper acetate? I am speaking of them collectively.

The Court: Let me hear that question again.

(The question referred to was read by the reporter as follows:

“Q. In your examples allegedly representing Nelson and Fredericks you employed, did you not, copper chloride and copper acetate? I am speaking of them collectively.”)

The Witness: I am sorry. I didn't know that that was a question.

Yes, we employed them.

Q. (By Mr. White): I believe you have testified that the other compounds which you employed were not specifically mentioned in either patent. [244]

The Court: If he has testified let us let it go at that without going over it again.

Q. (By Mr. White): Now referring to the compounds listed in the answer to Interrogatory 18, would you consider practical the use of calcium

(Testimony of Norbert C. H. Muench.)

acetate as a wax coloring material in a candle like your Make-a-Rainbow candle?

A. I would much rather have a brighter color than gray.

Q. Would you use zinc acetate alone?

A. That would have a sort of a white appearance so I wouldn't use it alone.

Q. In your answer, however, you said in combination——

A. With blue.

Q. ——with alizarin blue? A. Yes.

Q. That, however, is a dye, isn't it?

A. Yes.

Q. Would you use satisfactorily copper nitrate?

A. Well, I would rather use copper acetate. I could use copper nitrate though because it would give a bluish appearance to the wax.

Q. A very faint blue, however?

A. That is right, a very light blue.

Q. What about copper oxide?

A. Copper oxide would have a tendency to show red [245] because the crystals are reddish.

.Q It wouldn't be a satisfactory coloring material to put in one of your commercial candles, though?

A. It would all depend on what shades you want. If you wanted light shades you could use that.

Q. But you don't use that color?

A. We don't use that, no.

Q. Would you use satisfactorily copper sulphate?

(Testimony of Norbert C. H. Muench.)

A. Copper sulphate I have used in making up a color out of blue vitriol.

Q. Could you use it as satisfactorily as a wax soluble dye?

A. We used it for coloringn. In fact——

Q. Mr. Muench, can you use it as satisfactorily as a wax soluble dye?

A. As a wax dye, yes.

Could you use it as satisfactorily as a wax soluble aniline dye? Would it be as satisfactory as the aniline dye?

A. Yes, for many purposes. It might be better than a wax soluble dye.

Q. Would it be as satisfactory in your Make-a-Rainbow candle? A. Yes.

Q. Would you have to use more or less that you would of the aniline dye? [246]

A. No, you wouldn't have to use more because the tendency for the metallic salts—they would have a tendency to plug up the wick and cause the candle to drip more than an aniline dye which would be consumed in its entirety.

Q. Which is more intense in color?

A. There are so many aniline dyes that I would have to make comparisons.

Q. What color would you get with copper sulphate?

A. Copper sulphate you might get a bluish color or a greenish color.

You know, that is blue vitriol, isn't it, copper sulphate?

(Testimony of Norbert C. H. Muench.)

Q. Right.

A. And way back in 1914 I personally made color with that. In fact I have got a book right here in my pocket that proves it, and we have used it ever since.

Q. But not in your Make-a-Rainbow drip candles?

A. We have used it in other candles. It is a dye just the same.

Q. Would you consider ferric ammonium sulfate satisfactory in one of your commercial Make-a-Rainbow candles?

A. Would we consider it satisfactory?

Q. Yes.

A. We would possibly use some other color in preference to that because it would be easier to use for us. But [247] we could use it.

Q. How about ferric hydroxide alone?

A. I don't see any reason for not using it. We could use that too. It would give a red color to the wax.

Q. Why in listing it did you say in combination with oil creates a brown?

A. That the ferric oxide——

Q. I was speaking of ferric hydroxide.

A. Excuse me.

No, we possibly wouldn't mix it with oil but we could.

Mr. Lyon: I call your attention, Mr. White, to the fact that Fredericks calls for mixing his with oleic or stearic acids, which are oils.

(Testimony of Norbert C. H. Muench.)

Mr. White: That is a conclusion in the testimony of counsel. Would you say that all oleic acid materials are the same as stearic acid?

The Court: Let us argue the question to the court later on rather than debate it between you gentlemen now.

Q. (By Mr. White): Mr. Muench, I call your attention to Defendants' Exhibit N. As I understand the manufacture of the candle, the Make-a-Rainbow candle, which I believe was made starting sometime in 1952 by the process represented here——

A. We began September 5, 1952, to make the candles with the mother color on the core. [248]

Q. We have at the left what appears to be a wax coated wick.

A. Sort of a taper.

Q. And which I understand in the second tapered wick has been somewhat enlarged in diameter.

A. Yes, a little over a quarter of an inch in diameter.

Q. You would say approximately a quarter of an inch?

A. It could run between a quarter and three-eighths, someplace in there.

Q. Now I understand that we see here applied to the outside of what I call the second step——

A. We call it the core.

Q. The core? A. Yes.

Q. ——a series of dyes starting at the top with pink—remembering that yesterday I was slightly

(Testimony of Norbert C. H. Muench.)
color-blind, so correct me if I am wrong—pink, lavender——

A. It looks more like purple to me.

Q. ——purple, then red, then yellow, then a yellowish orange——

A. That is sort of an orange, isn't it?

Q. ——an then—— A. A blue.

Q. ——blue, then white, or the blue represents the end of the color? [249]

A. Yes.

Mr. Lyon: I think this came off the ribbon, Mr. White.

The Witness: No, I think that was on.

But the fact is this, that the order there we change occasionally. We change our dyes sometimes in the fall months when we will use different dyes than we will use in the spring months.

Q. (By Mr. White): Why do you change the order of them?

A. Well, we do that, we may run that color and then we may change from, say, this color because we may like a different color in there. We might put, say, a deeper orange or we will figure that this may not have enough heavy color, it may be too light, we may put a green in there, or any other color that we might use.

Q. If you kept them the same in the course of time your steady customers would be able to predict the succession of colors, would they not?

A. We never thought of that. I don't think anybody outside of somebody who wants to bet on the

(Testimony of Norbert C. H. Muench.)

way they turn up would care about that. Then they might like a variation.

But the reason we change is in order to have a novelty candle that is always new, and that is one reason why we do it.

For instance, in the winter on many of our candles we [250] put fall colors, as in the fall months, and in the spring, just before Easter, we will use more pastel shades.

A novelty candle is a constantly changing thing, Mr. White, and in order to stay in the field and be leaders you have to keep doing that all the time. That is why we get out a different catalog each year. [251]

Q. The unpredictability of the color occurrences is one of the attractive features in the candle, is it not?

A. You might call that the novelty of it, yes.

Q. After thin taper No. 2 has been coated, has had the coloring applied to it?

A. The colored wax, yes.

Q. That is colored wax containing aniline dye in each instance?

A. Aniline dyes. If we were using a green on that particular one, we would possibly use copper acetate, because that is what we usually use for green in our coloring of candles.

Q. But you haven't used it as yet?

A. Yes, we have used it in the past, but it doesn't happen to be on that particular sample.

(Testimony of Norbert C. H. Muench.)

Q. Or it has not been used in the making of your Make-a-Rainbow candle?

A. Yes, we have used them in the past, copper acetate.

Q. In your Make-a-Rainbow candle?

A. Yes.

Q. You referred to copper acetate?

A. Yes. It makes a green color.

Q. That is not a——

A. Wait a minute. We don't use the copper acetate directly on it, if that is what you mean. We make a green color [252] out of copper acetate.

I have here a formula that I wrote up way back in 1914 when I was with the Will & Baumer Company. Since we made it this way we have changed it some, but we still—at that time we used blue vitriol, now we use copper acetate which we buy from somebody like American Cyanamid, through one of their outfits.

Q. You have been familiar with the tendency of copper acetate, copper sulphate, to give coloring to wax for quite a long time, haven't you?

A. Yes. Well, here I have it since 1914, and before I was mixing it they were using it. And also prussian blue was used a good deal.

Q. You were familiar with it back to the time that you undertook to make the flame colored candle for the boy over in Chicago, weren't you?

A. Yes, sure. Of course, we used other different types, and that was an experiment where we were playing around with a number of different types.

(Testimony of Norbert C. H. Muench.)

Q. Now, we come to taper No. 3, which I understand, Mr. Muench, represents just a progression in the wax buildup on taper No. 2?

A. What you call, I believe, body wax. We call it candle stock.

Q. No. 4 is a continuation of the body wax built up on [253] No. 3, is it not? A. Yes.

Q. What is No. 5, other than a shaping of the candle as you desire it?

A. The base cut-off.

Q. From No. 4? A. Yes.

Q. The base diameter of the candle is approximately what?

A. Between one inch and seven-eighths. They vary. They average about 15/16ths diameter.

Q. Roughly an inch?

A. Yes, roughly an inch.

Q. And the taper of No. 2 is about a quarter inch?

A. A quarter to three-eighths.

Q. So the bulk of the wax in the candle has been gained by building up on the taper?

A. Yes, sir.

Q. So, therefore, we have the main bulk or body of the candle represented by the wax which has been applied in tapers Nos. 3 and 4?

A. Yes.

Q. As you make these candles, as they go out on the market, they appear as we see them here in No. 5, do they not? [254] A. Yes.

(Testimony of Norbert C. H. Muench.)

Q. The coloring materials are concealed in the candle, are they not? A. Yes, sir.

Q. And the candle would lack its element of surprise if they were not concealed, would it not?

A. Yes. That word "surprise," we never thought of that. We made a candle to drip colors, whether it was this kind or that. There it is concealed inside the body, too, for the same reason (indicating). Let's call it surprise.

Q. Do you use the word "surprise" in your advertising?

A. Let me say this: When you get to the advertising profession, they sometimes can carry a long ways up in the air.

Q. In the course of time over a period of say four or five years the dye applied to taper No. 2 migrates, doesn't it? A. Yes, sir.

Q. And over that period of time it may migrate sufficiently as to show in the body of the candle?

A. Yes, that is true of all aniline dyes, particularly in any kind of candle. We call it bleeding.

Q. That is not the intended condition of the candle as you first put it on the market?

A. No, of any candle. We hope that they burn them [255] right away so we can sell more candles.

Q. As a matter of fact, most of them are burned relatively soon, are they not?

A. Yes, I would say. I would hope so, anyway.

Q. And the distance radially within the candle that the wax will migrate is largely a function of time, isn't it?

(Testimony of Norbert C. H. Muench.)

A. Yes, sir. And the way they are stored. If they are stored in a warmer place the colors will migrate faster than if they are stored in a cool place.

Q. When finished candle No. 5 is burned, the heat developed by the wick flame melts the wax adjacent the flame, does it not?

A. Yes, sir, it melts the candle wax.

Q. And as the candle wax melts the dye which we see on taper No. 2 simply goes into solution in the melted wax, does it not?

A. More or less, yes, sir.

Q. And as the wax accumulates, being colored, the candle tends to crater and spill over, at least to one side, and thus we have the formation of the colored dripping? A. Yes.

Q. Insofar as the dissolution of dye in wax is concerned, that dye will so dissolve in the wax, whether the dye is the distance of the surface of taper No. 2 from its wick, [256] or whether the dye is directly on the wick?

A. Excepting that on the core it dissolves better than in the wick.

Q. But it dissolves in both instances in the wax in essentially the same way?

A. Excepting that in the wick there is part of it that is consumed and burned in the flame.

Q. But insofar as what dissolves in the wax is concerned, in both instances the dye dissolves in the wax in essentially the same way? A. Yes.

Q. That was true of your first Make-a-Rainbow candles, was it not? A. Yes.

(Testimony of Norbert C. H. Muench.)

Q. Incidentally, in the manufacture of that one, of which we do not have now a sample, were the different colored waxes applied directly and at some spaced locations to the wick?

A. Very similar to that, Mr. White, excepting that we placed it directly on the wick.

Q. Was there any spacing in between the dye gobs?

A. The dye applications, we never particularly paid much attention to placing a white spacing between them; we spaced them usually one after the other to get them up close to the tip of the candle.

Q. One final question, Mr. Muench: Is this not true, that in such prior art as Nelson, Fredericks and Funke, the choice of any flame, attempted flame coloring material used, was based upon the metal that the compound or material happened to contain; is that not right?

A. The flame was based upon the metallic salts that were used in the candle? Do I understand your question correctly that way?

Q. Do you recognize a distinction, Mr. Muench, between the metal content of, say, a salt, and the entire salt? To illustrate my point, may I ask you this question? We all know that common table salt is sodium chloride. That is a compound having metallic sodium, to which is chemically bound chlorine. Are we in agreement on that?

A. Well, I never paid particular attention to the use of table salt excepting on my food, but I will take your explanation of how it is made.

(Testimony of Norbert C. H. Muench.)

Q. These people who attempted to color the flame said, did they not, that sodium tended to color a flame yellow? A. Yes.

Q. Now, we all have seen the salt, white sodium chloride; but it is not yellow, it is?

A. Salt is white.

Q. So, therefore, a compound which might tend to give [25S] a flame one color doesn't at all necessarily color a wax the same color, does it, or color it at all?

A. Copper acetate would color the flame green, and it forms a green colored wax, too.

Q. But sodium chloride doesn't, does it?

A. No.

Q. Potassium chloride wouldn't?

A. If you get in a lot of those, I will have to plead ignorance, because I haven't studied it from that point. But I imagine there are some that do and some that don't.

Q. Then we are in agreement, are we not, that there are compounds of metals which under certain temperature conditions might give a flame color by reason of the metal, but which as compounds, when dissolved in wax, would not give the wax a corresponding or any color?

A. Some, yes. Others would.

Q. Do you happen to know, Mr. Muench, whether the temperature of the flame in a candle is high enough to liberate the metals contained in the Fredericks, Funke, and Nelson compounds to give a coloring?

(Testimony of Norbert C. H. Muench.)

A. I can't answer that, Mr. White.

Mr. White: That is all. Thank you.

The Court: Redirect?

Mr. Lyon: Yes, sir. [259]

Redirect Examination

Q. (By Mr. Lyon): Mr. Muench, what would be the action of strontium bromate if used in a candle wax?

A. By the action do you mean the color?

Q. Yes, what color wax?

A. May I look it up?

Q. It will take some time for you to look each one of these up. I think you did look them up when you answered the interrogatories for me.

A. I thought I would want to make sure, after Mr. White got through with me.

Strontium bromate here, it gives a yellowish crystal.

Q. How about strontium nitrate?

A. Strontium nitrate is a white power.

Q. How about strontium oxide?

A. It is a grayish-white power.

Q. How about cadmium orange?

A. Cadmium orange would give an orange color, of course.

Q. Cadmium oxide?

Mr. White: What chemical compound is cadmium orange?

Mr. Lyon: Will you look that up for him, please?

The Witness: Cadmium orange, it is used as a

(Testimony of Norbert C. H. Muench.)

pigment here, it is a form of cadmium selenide, which would give an [260] orange. It is used as a pigment.

Q. (By Mr. Lyon): Impure form of cadmium selenide. Okay.

A. Cadmium oxide is yellowish-red or brownish-red. [261]

Q. Referring now to the Fredericks patent, page 2, second column, line——

A. If you want me to look at that, Mr. Lyon, I haven't any copy.

Q. I will read you what I am referring to.

The paragraph reads:

"The color-producing metallic salts I use——"

The Court: Page 2, what?

Mr. Lyon: It is at the bottom of page 2, the right-hand column, line 65.

"The color-producing metallic salts I use in my colored flame candles, are the halides, nitrites, nitrates, acetates, oxysalts, ammoniates, chlorates, perchlorates, alcoholates, oxides and hydroxides and other salts of——"

Then it goes on with a list of a number of minerals.

I ask if that word "other" was taken by you as justifying using salts that were not mentioned in the Nelson and Fredericks patents in preparing your exhibits here.

A. I think it is that word "other salts" that got me in a hassle with Mr. White yesterday. I took that

(Testimony of Norbert C. H. Muench.)

to mean any type or kind of salts that might be available or usable for that purpose.

Q. Now it just so happens that you came out here to California in 1953 and met with me and I believe Mr. White [262] at that time. At that time had you produced for my edification some candles that you thought were made in accordance with the Nelson and Fredericks patents? A. Yes, sir.

Q. I hand you what has been previously identified as Defendants' Exhibit E-3, and ask you if that is one of the 1953 candles that you gave to me.

A. Yes, it is.

Q. How was that candle made and what are its ingredients?

A. That candle was made under the Fredericks patent as I described it previously, and it had the copper acetate, copper chloride and strontium chloride made in accordance with the Fredericks patent.

Q. Now each one of those salts that you have just mentioned, copper acetate, copper chloride and strontium chloride, each one of those is specifically mentioned in the Fredericks patent, is it not?

A. I believe it is.

Q. What is the ply of the wick in Exhibit E-3?

A. This particular one we made with a 21-ply wick, and it was tagged as such.

Mr. Lyon: I will offer this candle in evidence and, with the court's permission, will burn it.

The Court: I do not think I will burn it now. I have [263] an appointment which will take me

(Testimony of Norbert C. H. Muench.)

downtown at 11:30, so I will have to recess a few minutes after 11:00.

How long will it take to burn?

Mr. Lyon: Five minutes.

The Court: Very well.

This is admitted in evidence.

(The exhibit heretofore marked Defendants' Exhibit E-3 for identification was received in evidence.)

The Court: And that has what size wick?

The Witness: A 21-ply wick.

The Court: And the others have a 9-ply wick?

The Witness: These others that were burned had a 9-ply wick.

Q. (By Mr. Lyon): At the same time in 1953 did you manufacture a candle and leave it with me in accordance with the teachings of the Hausamann patent? A. Yes, sir.

Q. I hand you a candle and ask you if that is the candle you are referring to. A. Yes.

The Court: That is H-1, is that right, for identification?

Mr. Lyon: I believe so.

The Witness: That is the candle with the red core. [264]

Q. (By Mr. Lyon): And it also has a 21-ply wick? A. Yes, sir.

Mr. Lyon: I will light that, and I offer it in evidence.

The Court: Admitted.

(Testimony of Norbert C. H. Muench.)

(The exhibit heretofore marked Defendants' Exhibit H-1 for identification was received in evidence.)

Q. (By Mr. Lyon): At the same time did you manufacture a candle according to your understanding of the teachings of the Sterry British patent, using a single dye on the wick?

A. Yes, sir.

Q. Rather than three dyes? A. Yes, sir.

Q. I hand you what has been identified as Exhibit G-2 and ask you if that is that candle.

A. Yes, sir.

Q. And made in accordance with your testimony concerning Exhibit G except that you used a single blue aniline dye on the wick in this case instead of there? A. Yes, sir.

The Court: What is the size of that wick?

The Witness: That is a 21-ply wick.

Mr. Lyon: I believe this is already in evidence but if it is not I now offer it. [265]

The Court: It is admitted.

(The exhibit referred to was received in evidence as Defendants' Exhibit G-2.)

Mr. Lyon: And I will light this candle also.

Q. While we are waiting for the candles to burn, I call your attention to Exhibit Q and ask you if you can predict the order of the drippings in that candle.

A. Yes, I could from the way the color has bled through the surface of the candle.

Q. Where did we get that candle, do you know?

(Testimony of Norbert C. H. Muench.)

A. Where did we get this particular candle?

Q. Yes.

A. It came from us but I don't know when.

Mr. Lyon: Will you stipulate that that is one of the ones in the box that you gave us at the start of the trial?

Mr. White: Yes.

The Court: That you what?

Mr. Lyon: This is one of our manufacture which the plaintiff bought in the open market and gave us when he was giving us copies of the one that he was burning here in court.

The Court: Very well.

Mr. White: I will stipulate so long as we include in the stipulation when it was bought.

Mr. Lyon: When was it bought? [266]

Mr. White: 1953. I believe Mr. Wilson has testified it was ordered direct from Muench-Kreuzer.

Q. (By Mr. Lyon): Calling your attention again to Exhibit N, is that a portion of the candle part of the body of the candle, of the overall candle? A. Yes.

Mr. White: What portion is "that portion," counsel?

Mr. Lyon: The lower end of the third member from the left in Exhibit N, the bottom of the core on which is painted the mother color.

Q. And the mother color is applied on the body, on a portion of the body of the candle, is that correct? A. Yes.

(Testimony of Norbert C. H. Muench.)

Q. And does the mother color itself become a portion of the body of the candle in the wax?

A. Yes.

Q. As a matter of fact, in Exhibit Q it is pretty well spread throughout the entire body of wax, is that right?

A. Yes.

Mr. Lyon: Except for the demonstration of those candles burning, your Honor, I am through with this witness, unless Mr. White has some recross.

The Court: I guess not.

Mr. White: Except I do wish to ask him [267] to make a statement for the record as to what these candles do when they burn.

The Court: They are burning now.

This Exhibit G-2, the one on the right, is dripping blue, is that right?

The Witness: Yes, sir.

The Court: And Exhibit E-3, the one made on the pattern of the Hausamann patent——

Mr. Lyon: That is H-1, your Honor.

The Court: That has only red coloring inside?

The Witness: Yes.

The Court: And it is dripping red?

The Witness: Yes.

Mr. Lyon: And E-3 is this one.

The Court: And Exhibit E-3, the Fredericks patent, is now dripping green?

The Witness: Yes.

The Court: I notice that all three of them, that the flame is much larger than the flame on any of

(Testimony of Norbert C. H. Muench.)

the other candles that had a 9-ply wick, all three of these have a 2-ply wick.

I notice also that the flame at the wick as they burn in each one of them is blue.

Mr. White: They are about the same color, your Honor.

The Court: About the same color. [268]

Mr. White: I have two or three questions to ask concerning these exhibits.

The Court: Very well.

Recross Examination

Q. (By Mr. White): Exhibit G-2 corresponds, you say, Mr. Muench, to what patent?

A. The Sterry patent.

Q. You have here a single color applied to the wick? A. Yes, sir.

Q. Does Sterry say anything about designing a candle for dripping qualities?

A. He says nothing about making a candle to drip.

Q. Exhibit H-1 corresponds to the Hausamann patent, am I right? A. Yes, sir.

Q. With a single color throughout?

A. Yes, sir, a red core.

Q. Incidentally exposed at the ends?

A. More or less.

Q. Trademark-wise.

Does Hausamann say anything about making a dripping candle? A. No.

(Testimony of Norbert C. H. Muench.)

Q. Now we come to Exhibit E-3, which is [269] a candle made according to what patent?

A. The Fredericks patent.

Q. You have in the upper section of the wick what? A. Copper acetate.

Q. Next? A. Copper nitrate.

Mr. Lyon: Will you check that?

The Witness: Copper chloride.

Copper chloride.

Q. (By Mr. White): If you selected those two according to the purposes of the Fredericks patent they would produce the same effect, would they not, color the flame according to the characteristic copper color?

A. Yes, with possibly a little variation in the shade.

Q. Now if you were following the teaching of the Fredericks patent to produce coloring of the flame, would you have selected those two salts?

A. I might, but I possibly wouldn't put them in the same relationship to each other.

Q. What is the third salt down at the bottom of this candle? A. Strontium chloride.

Q. What color is strontium chloride?

A. That is supposed to give a reddish hue. [270]

Q. Does strontium chloride produce a red colored wax? A. No, it doesn't..

Q. As a matter of fact, it doesn't color the wax?

A. No, I don't think it does.

Q. Why didn't we burn that first, then?

A. You will remember, that I always am very

(Testimony of Norbert C. H. Muench.)

familiar with copper acetate and it was most natural to use. When you walk down the street you walk with your friend, not with a stranger.

Q. The third salt in that candle could just as well have been left out, could it not?

A. Well, remember these are some of the first candles I made, Mr. White, and in any case like that you experiment around. We used that in there to see what it would do. That is one of the candles I brought out at that time.

Q. As a matter of fact, it hasn't been for you an easy thing at all to produce, without the use of aniline dyes, a convincing multi-color drip candle? It has been difficult hasn't it?

A. Well, you know, Mr. White, you could use possibly Georgia red and mud in these candles and color the wax in that way.

Q. But you found it very difficult, have you not?

A. But you wouldn't put that out as a commercial candle, naturally. [271]

Now you are referring, of course, if I may say so, to the fact that all the candle industry has used aniline dyes——

Q. Just a minute. We are going far afield from my question. My question is simply this, you have found it very difficult to show to this court a multi-colored drip candle that hasn't involved the use of aniline dyes that you use in your Make-a-Rainbow candle? It has been difficult, hasn't it?

A. No, it hasn't. We brought out some of these

(Testimony of Norbert C. H. Muench.)

other colors according to my previous testimony that used metallic salts. Naturally you didn't accept them because they were colored. But we use the aniline dyes in our industry, and so does everybody else, because they consume with wax more easily than pigments or the lake colors. But we could use in this kind of a candle a pigment or a lake color, we don't have to use an aniline dye in there, and neither do you.

Q. Using the Fredericks patent, using those compounds specifically mentioned in the Fredericks patent, name them off to me, if you will, the ones that will produce this succession of colors.

The Court: Counsel, I am going to have to recess until 2:00 o'clock.

You will rest with this witness, Mr. Lyon?

Mr. Lyon: I have one question on redirect and then I am through [272]

The Court: We will resume at 2:00 o'clock.

Will you have other witnesses in rebuttal, Mr. White?

Mr. White: Yes, your Honor, but as far as we are concerned we could finish this afternoon.

The Court: Very well. 2:00 o'clock.

(Whereupon, at 11:05 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [273]

The Court: Ex parte?

The Clerk: No, your Honor.

Mr. Lyon: If the court please, Mr. Muench has called my attention to an error that was committed

(Testimony of Norbert C. H. Muench.)

this morning. I would like to ask Mr. Muench, if your records show what ply wick was used in Exhibit G-2.

The Witness: The Sterry patent?

Mr. Lyon: Yes.

The Witness: This candle here has a 30-ply wick; not 21-ply.

The Court: That is a bigger wick?

The Witness: Yes, sir.

The Court: Very well.

Mr. White: I believe we had before us a question in the morning session.

The Court: Yes.

Before we get to that, if I could ask the witness a question.

I understood that it was the size of the wick, largely, which causes the wax to burn and the candle not to drip. Now, the three exhibits there, what are they, E-3, G-2 and H-1—have respectively, a 30-ply wick and 24-ply wick——

The Witness: 21-ply wick [274]

The Court: But all three of them dripped.

The Witness: Yes.

The Court: Now what?

The Witness: The fact is that a wick is a good deal like a pipe. It will draw off the wax faster if it is a larger pipe; or it will draw off the water of a tank faster. Consequently, a 30-ply wick against the other extreme of a 9-ply wick has more capillaries to draw the wax up into the flames.

The Court: But it dripped.

(Testimony of Norbert C. H. Muench.)

The Witness: That is due a good deal to the movement of the air in the room here. And all candles are subject to that. If those candles had a 45-ply wick in them, they would drip. It wouldn't make any difference in regard to whether it had aniline dyes or not. If it had metallic dyes or pigment dyes, which have a tendency to plug up the wick and close up the capillaries, they would have a tendency to drip quicker than with aniline dyes.

The Court: These are not aniline dyes?

The Witness: This is an aniline dye (indicating), this is an aniline dye (indicating); this one here has metallic dyes, copper acetate, copper chloride.

The Court: By "this" we mean——

The Clerk: E-3.

The Witness: These two are aniline dyes (indicating).

The Court: H-1 and G-2 are aniline dyes? [275]

The Witness: Aniline dyes.

The Court: And E-3——

The Witness: Is a metallic dye.

The Court: Now, does the method of construction of the candle, insofar as placing the dyes on the wick, have anything to do with its dripping qualities?

The Witness: No, Especially aniline dyes.

The Court: It does not?

The Witness: It does not.

The Court: Explain your answer.

The Witness: The aniline dyes, of course, are

(Testimony of Norbert C. H. Muench.)

more consumable than metallic dyes, but the dyes, if they are placed directly on the wick, have a tendency, due to the heat, to oxidize somewhat, and it makes them darker. That is the advantage of using a core with the dyes or colored wax painted on the core, it doesn't get so close to the flame, and has a tendency to mix with the wax first, and keeps them from oxidizing. But they will both consume, whether it is on the wick or not, if they are aniline dyes.

The Court: On E-3 the candle was constructed in the method demonstrated by Exhibit N, the board, is that right?

The Witness: No. E-3 is a candle made according to the Fredericks patent. [276]

The Court: Was the dye impregnated in the wick in E-3?

The Witness: On E-3, the Fredericks patent, it teaches to place petrolatum on the wick and then implant these metallic salts on one side of the wick. The reason why they are placed only on one side is so that they don't get all around, and they use the term klinker, so it fuses and closes off the capillarity of the wick.

The Court: In other words, his conception was of a candle that would burn the wax?

The Witness: Burn the wax, yes, so it would not extinguish due to the metallic salts.

The Court: Now on E-3, then, you placed a different color on each side of the wick?

The Witness: That is right.

(Testimony of Norbert C. H. Muench.)

The Court: And no colors in the wax?

The Witness: That is right.

The Court: On H-1 did you put the colors on the wick?

The Witness: The colors dissolved into the wax and the wick is dipped into this colored wax, in this particular case a red colored wax, until a core was formed of approximately one-quarter of an inch in diameter.

After that core was formed it was permitted to harden, then the rest of the candle was made up with white wax.

The Court: Just covered over?

The Witness: Just covered over. [277]

The Court: And G-2, the Sterry candle?

The Witness: The Sterry candle is made by, I used the word ironing, the dye into the wick, and in this particular case it was just blue.

The Court: Just blue?

The Witness: Yes.

The Court: How long ago was that candle made?

The Witness: That candle was made I think in 1953. It may have been '52. It may have been a little earlier than '53.

The Court: And any candle that is that old with any dye in it would be apt to bleed through by this time?

The Witness: Yes, it would.

The Court: Four years later?

The Witness: Yes.

Mr. Lyon: I might say that that has been stand-

(Testimony of Norbert C. H. Muench.)

ing in a candlestick in my office since August 1, 1953.

The Court: Go ahead, counsel.

Recross Examination—(Continued)

Q. (By Mr. White): Mr. Muench, in connection with Exhibit E-3, when it was burned did it burn with anything resembling a distinct azure color flame?

A. The flame you are speaking of now?

Q. Right. [278]

A. You use the word "azure." I think it is more greenish. But that is azure too, isn't it, sort of a greenish-blue?

Q. Yes.

A. Well, it burns with a halo of greenish hue.

Q. Is it sufficiently distinct a color that you would represent to any of your customers that it is a colored flame candle?

A. Well, of course the hydrocarbons—

Q. Will you answer the question yes or no?

A. Will you ask the question again, please?

Q. Was that color distinctly of a hue as either Nelson or Fredericks represented it would be, to a degree that you would represent it—

The Court: To a degree?

Q. (By Mr. White): That you would represent it to any of your customers as a workable flame coloring candle.

A. Well, to a degree I would, Mr. White, because it does have this greenish halo on it.

(Testimony of Norbert C. H. Muench.)

The Court: But you could not say it has a greenish flame?

The Witness: Not entirely, no. The yellow overcomes it.

Q. (By Mr. White): Now the top compound which you put on the wick was [279] what?

A. That was copper acetate.

Q. And the next compound?

A. Copper chloride.

Q. According to Nelson and Fredericks you would get the same flame coloring, if any, from both copper acetate and copper chloride, would you not?

Mr. Lyon: I object. The question has been asked and answered.

The Court: Yes, Sustained.

The Witness: A lighter degree with the chloride possibly.

Q. (By Mr. White): And when we get to the bottom compound, which was what?

A. Strontium chloride.

Q. The flame coloring, if you burned it down, would be what?

A. Well, it is supposed to be a reddish color but I never was able to get it, if that is the answer that you want.

Q. But the wax couldn't possibly be a reddish color, could it?

A. No, because the salts were white. The wax, if it was a different color, though, Mr. White,

(Testimony of Norbert C. H. Muench.)

would be possibly tinted white by the strontium chloride crystals as a contrast. [280]

Q. But not in your candle.

The Court: If he is making a red candle.

The Witness: Yes.

Q. (By Mr. White): But he has not made a red candle, is that not true?

A. Not in this case, no.

Q. Now, Mr. Muench, what compounds selectable from Nelson and Fredericks would you use to get the progression of colors that we see in the second taper in your Exhibit N?

A. Well, I possibly wouldn't get the same colors but I would use some of these that were mentioned here.

Q. Just a moment. I would like to confine our answer exactly to that question. I am going to start with pink.

A. These are aniline colors. You wouldn't get the same degree or shade with metallic salts as you would with these, possibly.

Q. Am I correct in stating that you could not from either Nelson or Fredericks select a compound which would give you the pink that we see here at the top of taper No. 2?

A. I don't know that answer, Mr. White.

Q. We then next come to the purple. Can you tell me what compound you would use?

A. I don't know the answer of any of the salts

(Testimony of Norbert C. H. Muench.)

which would get these particular colors comparable to these aniline colors. [281]

Q. Just a moment. I am not comparing them with aniline colors but those colors.

The Court: That has been your question.

Mr. White: Yes. I beg your pardon. That is correct.

The Court: You asked what salts he would use to get those different colors and he said he didn't know.

Q. (By Mr. White): And that applies throughout the color sequence in the taper?

A. Yes, sir. I made no experiment to a comparison so I can't answer that question.

Q. And even if those colors were obtainable the flame colors resulting would not necessarily be the same, would they?

A. Not necessarily. It might be something else.

Q. Mr. Muench, what do you understand to be the body of that finished candle, No. 5 on the card?

A. The materials? It is made of a composition of stearic acid and paraffine.

Q. No. 1 is an uncolored taper.

A. Yes, made of the same composition.

Q. That is the core, is that right?

A. That is right.

Q. Now what we have added to build 2 to 3 and then to 4 represents the remainder of the white wax that goes into [282] the candle, is that not right?

(Testimony of Norbert C. H. Muench.)

A. Yes, sir. What you I believe call the body wax.

Q. Now which of these waxes to which we have referred do you regard as the body of the candle?

The Court: I do not understand your question, counsel. What is the body candle?

Mr. White: The body of the candle; yes, your Honor.

The Witness: I would say that the body is made up of the entire thing, the wick and the wax, just like a person's body is made of bones, blood and flesh. [283]

Q. (By Mr. White): Is the dye a part of the body of the candle? A. Yes.

Q. Have you read the Wilson patent?

A. Yes, I have read it. Don't ask me to give it, though, verbatim, or by memory.

Q. If we were to regard all the white wax together with the wick as the substance of a white candle, you would call that the body of the candle?

A. Yes.

Q. Is it not correct to say that here, as in Exhibit 2, you have put into the body of the candle a series of wax soluble dyes?

A. Yes. If I want to dye any candle, I would naturally put in the dye whatever I used—may I say, we never call this "body wax" in our company; we call it stock. Now, if you called it stock, it would be different from the wick, but when you call it the body, I would take it it meant the complete setup.

(Testimony of Norbert C. H. Muench.)

Q. Supposing we call the wax from the wick on out stock; would that be a proper term?

A. Yes. Or, if you prefer, candle stock.

Q. Candle stock.

In your candle you have concealed within that candle stock a series of wax soluble dyes? [284]

A. Yes.

Q. That was true with respect to the original Make-a-Rainbow candle, except there the dyes were adjacent the wick?

A. The colored wax was, yes.

Q. And here the only difference, in terms of candle stock versus coloring, is that the dyes have been moved out a ways from the wick approximately one-eighth inch?

A. That is quite obvious, about a quarter of an inch.

Q. Is it not true that our taper, you stated, was about one-quarter inch in diameter?

A. A quarter of an inch to three-eighths. It varies a little.

Q. If it were a quarter-inch in diameter, the dyes would have been moved out half of that, or one-eighth inch to the wick?

A. I see what you mean.

Q. Is that correct? A. Yes.

Mr. White: I believe that is all.

Thank you, Mr. Muench.

Mr. Lyon: The defendant rests.

Mr. White: I should like to call Mr. Bechtold.

(Testimony of Ira C. Bechtold.)

IRA C. BECHTOLD

called as a witness in rebuttal by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: Ira C. Bechtold.

The Clerk: Your address, please.

The Witness: 1987 Skyline Vista Drive, La Habra, California.

Direct Examination

Q. (By Mr. White): Mr. Bechtold, what is your profession?

A. I am a consultant in matters of industrial chemistry and chemical engineering.

Q. Will you state to the court your formal education preparatory to your present profession and the activities in the field of chemical engineering which you have engaged in following completion of your formal education?

A. My college education was secured the first year at San Bernardino Valley Junior College; the summer session at UCLA, University of California at Los Angeles; followed by three years at the California Institute of Technology, from which I received the degree of Bachelor of Science with a major in chemistry in June 1930. [286]

My first employment—

Q. May I interrupt, please? What chemistry subjects did you take at Cal Tech?

A. I took all of the chemistry course, which in-

(Testimony of Ira C. Bechtold.)

cluded general chemistry, qualitative analysis, quantitative analysis, physical chemistry, thermodynamics, atomic structure, and the associated mathematical courses which went with those. I took some courses in chemical engineering. I also took some courses in mineralogy and crystallography, which were in the geology school, but nevertheless associated with the chemical course.

Q. Then your industrial experience?

A. I was employed in my first employment by the MacMillan Petroleum Corporation in Long Beach as a research chemist. During this time I was concerned with the refining of petroleum products, involving the removal of, or, rather, the separation of various constituents, such as gasoline, oils, waxes, petrolatum, such things, from natural crude petroleum. I later spent some time in the cement industry.

Q. Excuse me. Did you have any occasion to observe waxes while you were in the petroleum work?

A. Oh, yes, that was one of the common products of petroleum.

Q. Candle wax? A. Yes. [287]

Q. Continue, please.

A. My experience in the cement industry followed the last-mentioned employment. I was employed by the California Portland Cement Company for about six years. During that time I was assigned to the Federal Bureau of Investigation—pardon me—the Bureau of Reclamation, to do work

(Testimony of Ira C. Bechtold.)

in connection with Hoover Dam. My services were loaned by my employer.

Later I joined the employ of the Portland Cement Association and was assigned to the National Bureau of Standards as a research associate.

Q. Where?

A. In Washington, D. C. Following this, in about 1941, I came to Los Angeles and joined the Fluor Corporation as a chemical engineer. The Fluor Corporation was engaged in the business of designing many kinds of plants for the petroleum and chemical industries, in practically all fields, handling both organic chemicals and inorganic chemicals, and products and reaction products of those.

I became director of process engineering for that company, which is the position as head of the chemical engineering design function of the company.

Later my responsibilities included direction of the research department, which conducted all of the developmental work of the company. And, also, I was given the assignment [288] of directing the instrumentation department, which was concerned with the control of processes in chemical plants.

In 1952 I set up my own business as an independent consultant, and have conducted that business ever since, and am doing so at the present time.

My work at this time encompasses, in general, most of the fields of my past experience. I am retained by people who are in the same general business as the Fluor Corporation. From time to time

(Testimony of Ira C. Bechtold.)

I am retained on a per diem basis in the oil industry, and many other fields.

Q. Dr. Bechtold, I believe you have——

Mr. Lyon: If you have finished examining the witness with respect to his professional qualifications, could I have a couple of questions on voir dire?

Mr. White: Surely. [289]

Voir Dire Examination

Q. (By Mr. Lyon): Mr. Bechtold, I didn't hear you mention anything about organic chemistry. At Cal Tech did you take any courses in organic chemistry? A. Several.

Q. Which ones?

A. Well, I took what they call elementary organic chemistry. I took organic chem lab, as they call it. I took advanced organic chemistry. I did a research project for inorganic chemistry. I made some materials for Dr. Lucas, who was our professor.

Mr. Lyon: Go ahead.

Direct Examination—(Continued)

Q. (By Mr. White): Is the petroleum industry concerned more with organic chemistry than inorganic chemistry?

A. Well, the petroleum industry is primarily an organic chemical industry.

Q. And Fluor Corporation, its chemical work is predominantly in the field of organic chemistry?

A. That is right.

(Testimony of Ira C. Bechtold.)

The Court: What is the difference between organic and inorganic industries? I did not go to Cal Tech. [290]

Q. (By Mr. White): Mr. Bechtold?

A. May I answer?

The Court: Yes.

The Witness: To the chemist all materials are divided into two general categories, one you might say characterized as the inorganic materials. They are the materials which originate generally from mineral substances, things which come out of the ground in the form of rocks, salts, things which had no association with living matter in any way.

Originally the term "organic chemicals" came because all of the organic chemicals that the early chemists used were derived from things like plants, animals, and therefore they attached the term "organic." They somehow had part of the life processes of living things.

The Court: As, for instance, in so far as rocks are concerned, cement is made from limestone?

The Witness: Right.

The Court: Limestone is a result of life?

The Witness: Right.

The Court: So limestone is an organic rock?

The Witness: No. In the sense of the chemist's definition limestone is inorganic now. It, as you say, may originally come from an animal or plant.

The Court: Or shell? [291]

The Witness: Yes, that is right, in its early days.

(Testimony of Ira C. Bechtold.)

However, if I could continue with the organic maybe I can clarify this.

The Court: Very well.

The Witness: Now the original compounds that were called organic were characterized by principally the presence of carbon and hydrogen and, to a minor degree, things like oxygen.

As chemistry developed the chemist came to make many of these carbon hydrogen combinations synthetically. They therefore continued to bear the name of organic chemicals.

Today there are many more man-made organic chemicals than there are originating from plants and animals. The list of organic chemicals grows by the hundreds every year.

The Court: You say that the oil industry is primarily concerned with organic chemistry?

The Witness: Right.

The Court: Because oil is the result of—what do you call those little things in the sea?

The Witness: Diatoms.

The Court: Yes.

The Witness: That is one explanation; yes, sir.

There are many theories as to the origin of oil. In fact, there may be various origins. However, they all relate to the idea that oil is a residue, kind of a condensed liquid [292] of organic bodies, that is, living organisms.

The old theory assumed that some fishes or something of that kind were laid down in large quantities and eventually reduced to this uniform oil.

(Testimony of Ira C. Bechtold.)

There is another theory which, as you indicated, says they came from a living cell called the diatom which, incidentally, has an inorganic shell, the ones we find today.

The Court: They are found in the sea water?

The Witness: That is right.

Another theory says that oil originates due to the action of certain bacteria. That is a recent idea which is getting lots of attention today.

Again bacteria is living things.

The Court: Then in a word the difference between organic and inorganic chemistry is that in inorganic chemistry you deal with dead things and in organic you deal with either living things or the result of living things?

The Witness: I think that is a reasonable definition.

Q. (By Mr. White): In the field of chemistry, Mr. Bechtold, what generally is meant by the term chemical compound?

A. The definition of a chemical compound is briefly a combination of chemical elements in relationship such as is dictated by the so-called valence or combining tendencies of these elements. [293]

The elements are approximately 92 in number.

The Court: Why do you say "approximately"? Did somebody discover a new one?

The Witness: Yes. With the advent of atomic energy it is possible to make transitory elements that last only a short time. They are either on the

(Testimony of Ira C. Bechtold.)

end of the table or in between other elements. So you can't say that there are only 92 any more.

Q. (By Mr. White): Are metals elements?

A. Yes.

Q. Do metals retain always their elemental properties when they enter into chemical combinations? A. No.

Q. Apropos the matter of chemical compounds as we are concerned with them, and referring to the Fredericks patent, page 2, column 2, starting at line 65, reference is made to color-producing metallic salts.

What are metallic salts?

A. Metallic salts are formed from the combination of a metal with another element which is a non-metal.

Another definition of a salt is a compound derived from combining a base, which is the metal-bearing substance, and an acid, which is the non-metal-bearing substance.

A metallic salt always contains a metal, which is called [294] a cation. The non-metal substance or element is called the anion.

Q. What are oxides?

A. Oxides are a combination of an element with oxygen.

Q. What are hydroxides?

A. Hydroxides are the bases I referred to. They are a combination of a metal with oxygen and hydrogen.

Q. Fredericks groups all of such things as hal-

(Testimony of Ira C. Bechtold.)

ides, nitrates, nitrites, acitates, oxysalts, ammoniates, chlorates, perchlorates, alcoholates, oxides and hydroxides, he characterizes those as being salts, does he not? A. Yes.

The Court: Metallic salts?

Mr. White: Metallic salts. That is right, your Honor.

The Court: Everything that he mentions there is metallic, is it not? Are there salts of sodium? Is that a salt?

Mr. White: I am coming now to what the witness has referred to as the halides, nitrates, and so forth. Those are what you have referred to as the anions.

The Witness: That is right. [295]

Q. (By Mr. White): Now, I am coming to the cations and anions, sodium, potassium, lithium, boron, thorium, strontium, iron, copper, calcium, borium, cerium, and also powdered aluminum and magnesium. The latter are not compounds, are they?

A. No, sir; those are elements.

The Court: All these other in the previous paragraph are compounds, is that right? Halides—what is that?

The Witness: Halides is a group of compounds, a chloride, a fluoride, a bromide, they are all halides. The word "halide" is a chemist's term for the group including chlorine, bromine, fluorine. Those are known as halogens. And that is because they appear as elements with similar characteristics.

The Court: They are metals, are they?

(Testimony of Ira C. Bechtold.)

The Witness: No, sir. They are anions. They are the opposite of metals.

Q. (By Mr. White): Mr. Bechtold, if we had isolated and by themselves these metallic cations, sodium, potassium, lithium, et cetera, under what circumstances would they produce a color?

The Court: What is the first part of your question?

(The question was read by the reporter.)

Mr. White: What I mean is a coloring of a flame.

The Witness: Do you mean if we had these as elements? [296]

Mr. White: Right.

The Witness: If you were to introduce at least some of these elements as the element into a flame, and the flame is at a high enough temperature, they would color the flame with a characteristic color, which is due to the nature of the metal. Some of these would be hard to get to a high enough temperature. Iron, for example, you have to raise it to a very high temperature before you get its characteristic color.

The Court: Would you be apt to get enough heat out of the flame of any one of these candles here to produce a color, from any one of those mentioned?

The Witness: Not substantially. You might with sodium, for example.

Q. (By Mr. White): If sodium were isolated?

A. By itself.

(Testimony of Ira C. Bechtold.)

The Court: That would give you a little bluish——

The Witness: Sodium would be yellow.

The Court: Yellow:

The Witness: Yes.

Q. (By Mr. White): Is it more or less difficult to produce any flame coloring from these metals when they are chemically combined as halides, nitrites, nitrates, et cetera?

A. That would depend on the combination. It would be more difficult to make any metal which is already existent as an oxide or a hydroxide produce a color, because it is, in [297] effect, already burned, it is already an oxide, it has been oxidized. Therefore, it is difficult to make it part with its existent oxygen and do it all over again. However, if it was in the nature of a halide, for example, the sodium or potassium or lithium halides tend to be more volatile to heat, and therefore they will get up into the flame easier than some of the others.

The Court: That is to say they have a lower burning temperature, is that right, burning point. How do you express it?

The Witness: I expressed it as being more volatile. They are a compound of the salt that has, we will say, a little more vapor pressure. It wants to go up with heat, so it tends to rise to the flame a little better.

I would like to say this is a rather narrow distinction. None of these things are easily burned in flames.

(Testimony of Ira C. Bechtold.)

The Court: Such as you would secure from an ordinary wax?

The Witness: That's right.

The Court: Ordinary candle?

The Witness: That is right. The chemists use this effect of colored flame to make tests in the laboratory to determine what metals are present. There is a standard procedure over many, many years.

When the chemist does this, he uses a much hotter flame. [298] He uses a Bunsen burner flame, for example, which is very much hotter than a candle flame.

The Court: It produces what degree of heat?

The Witness: I don't know what the temperature is of a Bunsen flame. However, it is very much hotter than a candle flame. A chemist uses a platinum wire, which won't burn at all. He doesn't want it to burn. He dips it in a solution of the salt that he wants to test and holds it in the Bunsen flame, and when the wire gets hot enough there will be a flame of the color of the metal in the salt.

The Court: That is the way he determines what the metal is?

The Witness: That is right. And that pertains to certain of the metals which give characteristic flame colors. There are many metals which do not give characteristic flame colors, and the chemist cannot use this simple test to identify those.

Mr. White: I was so interested in that description, I have forgotten my question.

(Testimony of Ira C. Bechtold.)

Q. (By Mr. White): Mr. Bechtold, you have read the professions in the Funke, Nelson and Fredericks patents as to the flame coloring attributes of the candles described therein? A. Yes, I have.

Q. Has it been your observation during your presence [299] here at the trial that any candles burned during the course of this proceeding, and containing any metallic compounds spoken of by Nelson, Fredericks or Funke, operatively color the flames as the patentees describe that they will be colored?

A. No.

Q. Do you have any means for demonstrating to the court the difference between the flame coloring, of which a metallic cation or metallic element by itself is capable, as against the color of that metal in chemical combinations?

The Court: Well, if he answers that question, you have lost me. Maybe if the reporter reads it over again I can understand it.

(The question was read by the reporter.)

The Court: Can you answer it?

The Witness: Shall I answer it?

The Court: Yes.

The Witness: Yes. Let us take an example. The salt strontium chloride, that I believe is the first one mentioned by Nelson in column 1, line 44 and line 45, strontium chloride is a simple two-element salt, it is composed of the element strontium, which is the metal, and chlorine, which is the non-metal. It is not unlike ordinary table salt in that respect.

(Testimony of Ira C. Bechtold.)

That is, sodium chloride. It looks like ordinary table salt. It is white.

The Court: Is table salt a metal? [300]

The Witness: Yes, sir. The sodium is a metal. It is a metallic salt.

Strontium as an element happens to be one of the metals which has a nice characteristic flame color. Strontium gives a somewhat reddish or scarlet, the tables used by the chemists say, flame. You take strontium chloride, dissolve it in a little water, dip a platinum loop in it, as the chemists say, hold it in a flame of high enough temperature, such as Bunsen flame, it will color the flame red. This is due to the metal being volatilized from the salt and going into the flame and producing this characteristic color, because of what we call excitation of the atom of the metal. The chloride portion of the salt has no bearing on this color.

Any other anion would give the same color as strontium in the flame. However, in the salt itself, this metal imparts no color. Salt is white. As a matter of fact, the pure crystal of the salt would be colorless, you could see through it like glass. The reason it is white when you buy it in a bottle is that the crystals have been crushed and broken and you get surfaces which are white. So the fact that the excited metal in the flame makes a red color is the reason for coloring the flame. When it is combined with the chloride in the salt it is not in this excited state, so it colors nothing. It gives it a colorless or a white color.

(Testimony of Ira C. Bechtold.)

Q. Can you identify these wax bodies which I hand to you for the court? [301]

The Court: Are those marked for identification, Mr. White?

Mr. White: I was just about to suggest that. We have quite a number of these, your Honor. If there was some way of consolidating them as exhibits it would perhaps be more convenient.

The Court: We will have the afternoon recess and you can get together with the clerk and figure out some way to mark each one of these. I see a whole bunch of them on the table.

Mr. White: Yes. Thank you.

The Court: We will have our afternoon recess.

(Short recess.)

The Court: Did you get them all marked?

The Clerk: Yes, your Honor.

The Court: Those are numbers what?

The Clerk: Nos. 18-A to 18-L both inclusive.

(The exhibits referred to were marked Plaintiff's Exhibits Nos. 18-A to 18-L inclusive for identification.)

The Court: Those are what? What do you call them?

The Witness: We call them pats, p-a-t-s.

Q. (By Mr. White): Mr. Bechtold, I hand you Exhibits 18-A and 18-B and will ask you to describe them to the court.

A. These exhibits are pats of candle wax prepared by [302] myself and Mr. Wilson in his plant in San Gabriel on February 14, 1956.

(Testimony of Ira C. Bechtold.)

Exhibit 18-A is one which was prepared from a candle wax consisting of paraffine and stearic acid, such as I understand is normally used in the body of candles, and mixed therein was the salt strontium nitrate.

Exhibit 18-B is exactly similar except that mixed therein is the salt strontium chloride.

Q. Does either of the pats have a color noticeably different from that of ordinary white candle wax? A. No.

Q. According to Nelson and Fredericks what color does strontium give to a flame?

A. A red or scarlet color.

The Court: Let me see. Do you have the Nelson patent in front of you?

The Witness: Yes.

The Court: Page 1, beginning at line 42 he cites a few examples.

"To cite a few examples of a great variety of salts which can be used in connection with the present invention, strontium salts * * * give a scarlet flame; barium salts give a green flame; potassium salts produce a violet flame; copper halides give an azure flame; zinc salts produce a [303] white flame; selenium salts produce a light blue flame; calcium salts produce a brick-red flame; sodium salts produce a bright yellow flame of a more definite and intent yellow than an ordinary flame."

Is that correct? I do not mean in a candle but if these salts are applied to this aluminum stick that you talked about and heat it with a sufficient degree

(Testimony of Ira C. Bechtold.)

of intensity, would these materials produce the color of flame which this patent says they will?

The Witness: With the exception of selenium, yes.

The Court: Selenium would produce what, nothing?

The Witness: Selenium is not a metal. Selenium in a salt acts as an anion, therefore you would have to have another element of metal in combination. You would therefore get the color of the metal in the flame rather than the selenium.

The Court: So selenium, except for the statement selenium salts produce bright blue flame, the other statements in that paragraph are correct except they will not do it in candles?

The Witness: Right. [304]

The Court: What, Mr. White, is the purpose of all these exhibits?

Mr. White: To show the lack of relationship between the classes of chemical compounds referred to by Nelson for the purpose of flame coloring, as against the defendant's purposes here of wax coloring.

Our purpose here is to prove that there is necessarily no correspondence whatever between them.

The Court: Between these materials which are said to produce a particular color of a flame, and the same materials painted in the candle to produce a colored wax when the candle burns?

Mr. White: That is right.

Now, it happens, and defendant has taken full ad-

(Testimony of Ira C. Bechtold.)

vantage of it, that the color that copper is supposed to produce in its flame is similar to the color of at least some of its salts, and notably copper acetate, of which we have heard so much.

Mr. Lyon: I think, Mr. White, if you make a statement of what it is you intend to prove, I will stipulate to it.

The Court: I asked you that because it seemed to me that from the position taken by defendant's counsel and Mr. Muench on the witness stand, he says that these materials introduced into a candle won't produce these colored flames. You get a little, what he calls a halo, once in a while, like [305] I could see in some of these burning, what I would call a little spit color.

Mr. Lyon: If what you are trying to prove is there is no necessary correspondence between a color which a given metallic salt will color a wax, and the color, if any, of a flame of that salt when burned, I will stipulate to it.

Mr. White: Now we are getting salts and metals mixed up.

Will it be stipulated that—I would like to have for the record a demonstration of this, your Honor, and I will endeavor to proceed just as rapidly as possible.

The Court: Each one of them, are you going to burn them?

Mr. White: No, they will not be burned. All that these pats represent, your Honor, are compounds of

(Testimony of Ira C. Bechtold.)

metals in the classes referred to by Nelson mixed with wax.

The Court: You want to demonstrate by that that they do not color the wax?

Mr. White: That is right. And since the defendant has asserted that it is following the teachings of Nelson and Fredericks, I want to prove with unmistakeable clarity that what is said about the flame color producing properties of the metal is no teaching of what compounds of that metal will color a wax.

Mr. Lyon: I will stipulate to it. [306]

The Court: I would suggest to counsel this: I have been reading the Nelson patent and the Fredericks patent, and I don't know what position counsel is going to take for the defendant, but in reading them against the plaintiff's patent, and the way plaintiff introduces his material, the Nelson patent says either in the body or in the wick. If that constitutes a sufficient disclosure in the Nelson patent and in the Fredericks patent, it says the metallic salts may also be applied to the vehicle-bearing wick as a saturated or as an unsaturated salt, and in column 2, page 1, each paragraph there he mentions coloring the wick, it seems to me that that would be the thing that would constitute the anticipation, if any.

I have been trying to follow the testimony concerning all of these salts, and so on and so forth. I may be wrong. I don't wish to have you feel that you are foreclosed. But it seems to me that the nub

(Testimony of Ira C. Bechtold.)

of this coconut here is introducing the color in the wick, and not whether it is selenium salts or some other kind of a salt, or aniline dye, or anything else.

Mr. White: No, I don't believe, your Honor, if I may take exception——

The Court: You certainly may. I invite it.

Mr. White: The point here is what teaching do we find in Nelson or Fredericks of coloring the candle drippings. [307]

These compounds are referred to as flame coloring compounds, your Honor.

The Court: And your position is that they won't color the drippings?

Mr. White: We have examples here where they would be as ineffective as so much table salt to color the wax.

The Court: But maybe they will color the drippings.

Mr. White: No. If they will not color the wax on being mixed therewith, they will not color the drippings.

The Court: In other words, in order to introduce, to make these pats, you had to heat the wax?

Mr. White: That's right. These were made by putting the chemical compounds in the hot wax, and if the color doesn't show here, it will not show in the candle.

The Court: The hot wax being melted wax?

Mr. White: Yes.

The Court: And at least as hot as the flame of a candle?

(Testimony of Ira C. Bechtold.)

Mr. White: That is right.

Hot wax is hot wax from whatever source it comes.

The Court: I imagine some wax can get hotter at times than other. I don't know. Can it?

The Witness: Yes.

Q. (By Mr. White): But would it affect the color of the mixture of the wax with the chemical compound? [308]

A. No.

The Court: Let me see, now. Your position is, and what you now propose to prove, is taking the materials—I don't want to fall into calling them a salt or something else, because I don't know that—but taking the materials that are mentioned in the Nelson patent——

Mr. White: Right.

The Court: ——and in the Fredericks patent——

Mr. White: Right.

The Court: ——and introducing them into a candle, does not produce a colored wax?

Mr. White: With only comparatively rare exceptions.

Your Honor will recall my interrogatory in which I listed from Nelson and Fredericks 146 materials, and I have Mr. Muench's answer "out of which of those 146 can you point to as being candle coloring, candle wax coloring materials?"—and I got 10 out of 146.

Mr. Lyon: I might point out in the argument you presented to the Board of Appeals, you didn't say that most metallic salts will not color the drip-

(Testimony of Ira C. Bechtold.)

pings of the wax; you said metallic salts will not color the drippings of the wax. And you have just admitted that 10 of them will.

Mr. White: I can give you 145 more that won't. The point is just this—I think this is quite significant: These patents do not teach wax coloring. They simply do not. They [309] talk about flame coloring. And you can't use flame coloring directions for wax coloring.

You notice, your Honor, that the defendant did not undertake to furnish you with a candle made according to the specific examples in either Nelson or Fredericks.

Mr. Lyon: Now, Mr. White, I take complete exception to that. Exhibit E-3 contains absolutely nothing in the candle except materials specifically listed in the Fredericks patent.

Mr. White: All right. E-3 contains—I am talking about the examples, counsel. When a man goes to the Patent Office, applies for a patent, he gives as an example of his invention a specific description of it, it is getting to the point now where the Patent Office requires that with great stringency. Now, certainly, if any part of that patent is going to be operative, it is going to be the specific example that he sets forth. Now, referring to Nelson we find——

The Court: His example is on page 2, the first column, or is his example on page 2, the second column?

Mr. White: He has two. Starting in column 2,

(Testimony of Ira C. Bechtold.)

line 84, and continuing through line 94, that is a strontium nitrate.

The Court: Where? I don't find any line 94 or 84. There are 75 lines there.

Mr. White: Column 2 of Nelson, your Honor.

The Court: I was looking at the Fredericks patent. I [310] see.

Mr. White: There is an example of a candle made——

The Court: Specific example?

Mr. White: Specific example. And you can make and burn that candle and it will be just as white as if it didn't have any so-called coloring material in it. [311]

The next one, which is a mixture of strontium salts——

The Court: All right, counsel. Go ahead with your proof.

Mr. White: I think that there is merit in having actual solutions of these compounds that are said to have the coloring properties.

The Court: Very well, counsel. Go ahead.

Q. (By Mr. White): I now hand you, Mr. Bechtold, Exhibits 18-C, 18-D and 18-E——

The Court: Let me see, 18-A is the strontium nitrate?

Mr. White: Right.

The Court: Which is mentioned in column 2, between lines 85 and 90 of the Nelson patent on page 1.

(Testimony of Ira C. Bechtold.)

And Exhibit 18-B is not mentioned, is it, strontium chloride, in the Nelson patent?

Mr. White: Only over under salts, your Honor.

The Court: That is with strontium salts?

Mr. White: Right.

The Court: Very well.

Now you have 18-C, is that right?

The Witness: I have 18-C, your Honor.

Q. (By Mr. White): Will you state briefly what 18-C, D and E is, please? [312]

A. 18-C is a pat of wax containing barium nitrate. 18-D is a similar pat of wax containing barium chloride. 18-E is a similar pat containing barium oxide.

Q. These are pats uncolored by the barium salts?

A. That is right.

The Court: Where are those mentioned in the Nelson patent or the Fredericks patent?

Mr. White: In the Nelson patent, your Honor, column 1, he makes reference to barium salts at line 46.

The Court: Yes. I see.

Q. (By Mr. White): Now barium as a metal is stated by Nelson to give what kind of a flame?

A. Green.

Q. I now hand you for your description 18-F, G and H.

A. 18-F is a pat of wax containing copper chloride.

18-G is a pat of wax containing copper acetate, and I specify cupric acetate.

(Testimony of Ira C. Bechtold.)

18-H is a pat of wax containing copper nitrate.

Q. There are differences in the colors of those three samples or pats, are there not?

A. Yes.

The Court: 18-F, that has copper chloride, and what color is that, blue or green?

The Witness: I would call it a bluish green.

The Court: Very slightly colored.

The Witness: Yes.

The Court: 18-H, that is the copper acetate, cupric acid?

The Witness: Copper nitrate, I believe.

The Court: 18-G is copper acetate, and that is a deeper green.

The Witness: Yes.

The Court: And 18-H has a very slight green.

The Witness: That is right.

Mr. White: Here we have a sample of a single salt which is zinc chloride.

The Court: You haven't come to zinc yet, have you?

Mr. White: No, but that is the next one in order mentioned by Nelson.

This sample that we have happens to be marked poison on the bottle.

The Court: Is it poison?

Mr. White: Not to look at, your Honor.

Q. Mr. Bechtold, what is the color of that salt?

A. White.

Q. What is the color of wax, would it color a wax any differently than its own color?

(Testimony of Ira C. Bechtold.)

A. No.

Q. Mr. Nelson in his patent refers next to [314] selenium salts——

The Court: After zinc?

Mr. White: After zinc.

Q. Can you tell us about the applicability of selenium salts for practical wax coloring?

A. As I stated previously, selenium is an element, not a metal. It is like the element sulphur. It is intermediate between the metals and the non-metals. Therefore, if you attempt to make a salt in which you use the selenium as the metal it is difficult to form and is unstable.

Such combinations as selenium chloride, which might be comparable in this case to strontium chloride, or sodium chloride, is, I believe, as a liquid and a rather hazardous liquid, a volatile, smelly liquid. In fact, selenium is highly poisonous. When burned it makes an odor a little like sulphur burning, but much more poisonous than sulphur. Advice given constantly to those handling selenium is not to breathe the vapors.

Q. You would not recommend its use in a candle then? A. I would not.

Mr. Lyon: While you are on selenium, isn't it a fact that it is used to make red glass?

The Witness: Red glass?

Mr. Lyon: Yes, that is right.

The Witness: I don't know. [315]

Q. (By Mr. Lyon): I now show you Exhibits 18-I and 18-J. What are they, Mr. Bechtold?

(Testimony of Ira C. Bechtold.)

A. Exhibit 18-I is a pat of candle wax in which has been mixed calcium nitrate.

Exhibit 18-J is a similar pat of wax in which has been mixed calcium acetate.

Q. In each instance the wax is uncolored, is that right? A. That is right.

Q. What, according to Mr. Nelson, what flame color are these capable of producing?

A. Brick red.

Q. I now hand you Exhibits 18-K and 18-L. What are these, Mr. Bechtold?

A. Exhibit 18-K is a pat of candle wax in which has been mixed sodium nitrite, n-i-t-r-i-t-e.

Exhibit 18-L is a similar pat in which has been mixed sodium acetate.

Q. These wax pats are white in color?

A. That is right.

Q. What does Mr. Nelson say about the color of the flame that they would be used to produce?

A. He says it will produce a bright yellow flame.

The Court: The long and short of it, then, [316] is that in connection with all of these patents, Exhibits 18-A to 18-L, you have introduced all of the materials mentioned in this column 1 at the bottom of page 1 and column 2 in the Nelson patent except selenium salts and zinc salts, and none of them are colored except the one with copper and that has some green?

Mr. White: That is right.

Mr. Lyon: That isn't quite true. There is quite a few strontium salts in there.

(Testimony of Ira C. Bechtold.)

Mr. White: We have not attempted to introduce all of the strontium salts known or the barium or the copper or selenium or all the sodium salts. There are a great many salts of many of the metals. We have produced some ordinary ones and some of those specifically named here. And these I think may be regarded as typical also of Fredericks because I should like to call your Honor's attention to page 2, column 1, of the Fredericks patent in which there is given the three color types which we discussed at some length yesterday.

You will recall that the first type contained strontium chloride, which is white. We have a sample of that here. Certainly no one would use example 1 to produce a colored wax candle. The defendant didn't do so.

Second, we have cupric chloride, strontium chloride and sodium chloride.

Now from the pats you have seen the cupric [317] chloride is a weak green color. The defendant much prefers copper acetate.

Then Fredericks proposes to use strontium chloride and sodium chloride, neither of which by any possibility could color the wax.

The Court: He says cupric chloride crystals in his third and in his second, and if I understand that correctly that is Exhibit 18-G, which is green.

Mr. Lyon: That is one of the salts also that we used in Exhibit E-3.

Mr. White: Exhibit 18-G, your Honor, was copper acetate.

(Testimony of Ira C. Bechtold.)

The Court: And the witness said cupric acid.

The Witness: Cupric acetate.

Mr. White: But in Fredericks' examples, in the second example—as a matter of fact, in the two examples described as the alternate color type and the mixed color, he uses cupric chloride, and here is cupric chloride, 18-F.

The Court: That is copper chloride. Is that the same thing?

The Witness: Yes, sir.

Mr. White: Now the reason that exemplars of these specific examples is not produced is that if they were made they could not conceivably produce a succession of different colored wax drippings, these specific examples, because we have seen here—— [318]

The Court: Are you arguing your case now?

Mr. White: I am afraid I am, your Honor.

The Court: All right.

Q. (By Mr. White): Mr. Bechtold, you have studied——

The Court: You are now going to another subject?

Mr. White: Not really. I am still talking about the colors.

The Court: What I was going to say, I have counsel waiting in chambers on another matter where they have to get a brief filed today in a prohibition proceeding against me, so I will have to take a recess until tomorrow morning at 10:00 o'clock.

(Testimony of Ira C. Bechtold.)

I am sorry to have to interrupt the trial so much but I just cannot help it.

Mr. White: Would it be possible, your Honor, for me to have, say, five minutes more with Mr. Bechtold? I say that for this reason, that he is committed for tomorrow.

The Court: Do you expect to finish with him in five minutes?

Mr. White: With Mr.. Bechtold, yes. Mr. Bechtold has commitments with clients for tomorrow that makes him unavailable to me.

The Court: How long will you be on cross examination?

Mr. Lyon: I have some cross examination of this witness. [319]

The Court: You do have cross examination?

Mr. Lyon: Yes.

The Court: How long do you think that will take?

Mr. Lyon: It all depends on what answers I get. It shouldn't take more than 10 to 15 minutes, if that long.

The Court: Suppose we have a recess and then I will come back out here and we will try to finish with Mr. Bechtold this evening.

Mr. White: I appreciate that, your Honor.

(Short recess.) [320]

Q. (By Mr. White): Mr. Bechtold, have you studied all the patents listed in Plaintiff's Interrogatory No. 15?

(Testimony of Ira C. Bechtold.)

The Court: That is, all these in the book of prior art?

Mr. White: Yes.

The Witness: Yes.

Q. (By Mr. White): Mr. Beachtold, do you find any of these patents a teaching of a candle containing a succession of different coloring materials which as the candle progressively burns will form successively different colored wax drippings

A. No.

Q. What would you do, Mr. Bechtold, in the selection of salts in accordance with them to accomplish the purposes of the Nelson and Fredericks patents?

A. Both Nelson and Fredericks state as their objective the production of candles which will exhibit colored flames upon burning. Therefore, I would select salts containing metallic elements which would color flame to whatever color I desired. I would, therefore, select salts having the proper metallic element present, and would carry out the impregnation of the wick, and in some instances the wax surrounding the wick with these salts.

The Court: If you did that and put it in the candle, would you get a colored flame? [321]

The Witness: No.

Q. (By Mr. White): Mr. Bechtold, I show you Defendant's Exhibit N and ask you if according to the teachings of the Nelson or Fredericks patents to you as a chemist you would be able to produce a

(Testimony of Ira C. Bechtold.)

similar number of different colors from what is taught in those patents, wax colors?

A. No.

Q. Have you studied the Wilson patent in suit?

A. Yes.

Q. Mr. Bechtold, will you compare for us briefly the disclosure in the Wilson patent with respect to the prior art which I identify as being listed in interrogatory 15?

A. Wilson has as his objective the production of a candle which will form multicolored drippings in succession as the candle burns. In other words, it is his object to have a candle containing within it materials which upon the burning of the candle will mix with the wax, flow outward to the rim of the candle and rip over the edge. Upon freeing or solidifying there will be a succession of different colored drippings.

Now, by comparison, Nelson and Fredericks have an entirely different objective. It is their desire to produce candles having distinctive colored flames. Both of these patents make reference to including in the candle materials which will impart to the flame a characteristic color of that [322] material. However, these patents make no reference to producing drippings of any color. They do not state that as an objective. They do not say that they do at any time. [323]

Q. Would one be guided by anything said by Fredericks or Nelson toward the production of a

(Testimony of Ira C. Bechtold.)

candle which would perform like the candle described in the Wilson patent? A. No.

Q. Referring to the list of compounds in the answer to interrogatory 18, Mr. Bechtold, do you find in either Nelson or Fredericks any reference to a barium chromate or other chromates?

A. Would you state that question again, please?

Q. Do you find in Fredericks or in Nelson any reference to a chromate as a coloring material?

A. Please identify the interrogatory number.

Q. No. 18. A. Yes.

Q. I am referring to the list of chemicals.

A. In the answer?

Q. Right.

A. I do not find any reference to barium chromate in the Nelson or Fredericks patents.

Q. Do you find referred to in either any material similar chemically to sodium silicate and aluminum which produces, according to the interrogatory answer, ultramarine blue? A. No.

Q. Do you find any reference to uranium dioxide or any [324] other uranium compound?

A. No.

Q. Do you find reference to any metallic stearate? A. No.

Q. Do you find reference to any benzine sulfonate of sodium or of any other metal? A. No.

Q. Do you find any reference to ferric ammonium sulfate?

The Court: Or any other metal in Fredericks?

Mr. White: Yes, a benzene sulfonate of sodium

(Testimony of Ira C. Bechtold.)

or any other metal. That is to say, a benzene sulfonate of any metal.

The Court: All right. I understand you now.

Q. (By Mr. White): Do you find reference to ferric ammonium sulfate? A. No.

Q. Do you find reference to ferric hydroxide in combination with oil? A. No.

Q. Do you find reference to any ferrocyanide salt in the category of prussian blue or iron blue or Chinese blue? A. No.

Mr. White: That is all.

The Court: Cross examine. [325]

Cross Examination

Q. (By Mr. Lyon): Mr. Bechtold, are you familiar with the publication known as *The Condensed Chemical Dictionary*, Fourth Edition, Reinhold, that I hold in my hand? A. May I see it.

Q. (Exhibiting volume to witness.)

A. Yes.

Q. I am going to read a statement from page 589 and ask you if you agree or disagree with it:

“Selenium. Se. A non-metallic element, atomic number 34, in Group VI of the periodic table. It is similar to sulfur and occurs with it in sulfide ores as well as in certain soils.

“Properties: Steel-gray, non-metallic rods or buttons; very high luster; crystalline surface on being broken. Also occurs in the form of dark red crystals or powder; soluble in carbon disulfide, concentrated sulfuric acid; insoluble in water and alcohol.

(Testimony of Ira C. Bechtold.)

Selenium burns in air with a bluish-red flame, forming selenium dioxide."

Then skipping some unimportant matter.

"Uses: The allotropic, red powder form is [326] used in microscopy as an imbedding material. Selenium is used in the glass industry for making red glass; * * *"

Would you disagree with that? A. No.

Q. Now, Mr. Bechtold, referring to the Fredericks patent, page 2, column 1, lines 64 and following, where those chemicals are listed, do you find that the metal copper is listed, and do you find that the salts, acetates, and sulfates are listed?

A. Would you state the question again, please?

Q. I said, you find listed there the metal copper and among the suggested salts are acetates and sulfates, is not that correct? A. No.

Q. Did I say sulfates?

The Court: You said sulfates.

Q. (By Mr. Lyon): Do you find acetates listed?

A. Yes. [327]

Q. You find nitrates? A. Yes.

Q. You find oxides? A. Yes.

Q. All right. Then if a person took, following the remaining teachings of the Fredericks patent, took copper acetate, and applied it to the wick of a candle, then he applied some ferric oxide to the wick of a candle, and then he applied some copper oxide to the wick of a candle, he would be using materials specifically listed in the Fredericks patent, would he not? A. Yes.

(Testimony of Ira C. Bechtold.)

Q. If he lit that candle, if he lit the wick of that candle, he would then obtain a candle, if it dripped, which would drip successively green, red, and blue, would he not? A. No.

Mr. White: I am sorry, counsel. I didn't get the succession of the chemicals there.

Q. (By Mr. Lyon): We will put them in this order: Copper acetate, which we have shown here will drip green; and we will take prussian red, ferric oxide; and then we will take copper oxide—that is a red, we had better take a copper hydroxide; so that we would go from green, to red, to blue, is that not a fact? A. No. [328]

Q. Why wouldn't copper acetate, for instance, give you a green dripping?

A. It would depend on how much of it you used.

Q. Well, if you used enough you would get a green dripping, couldn't you?

A. You asked me if we followed the teachings of the patent—right?

The Court: No. He first asked you if those metals are mentioned in Fredericks, if I understood.

Mr. Lyon: Yes. It is obvious that they are mentioned.

The Witness: Yes.

The Court: Then he said if you put those in a wick.

The Witness: Now, on page 1, column 2 line 38:

“The amount of color-producing metallic salts applied to the wick may vary from a trace”——

(Testimony of Ira C. Bechtold.)

I emphasize the word "trace."

"——up to an amount sufficient to produce the intensity of color desired."

I interpret that as meaning the intensity desired in the flame. To me as a chemist a trace is an un-measurable amount. Chemists refer to traces when they make analyses as things which they are not able to measure, but they detect things which they are not able to measure, but they detect they are there.

As a matter of fact, in coloring flames, it is better to use small amounts than large amounts. Traces will color [329] intensely, where sometimes large amounts will extinguish the flame. Therefore, if I were to follow Fredericks to produce a colored flame candle, I would use small amounts, which might not color the drippings.

Q. (By Mr. Lyon): We understand your position, but now——

The Court: But if you used more than that, they would color the drippings?

The Witness: Yes.

The Court: And you could get green and red—and what is the other?

Mr. Lyon: Blue.

The Court: Blue?

The Witness: Drippings, yes.

Q. (By Mr. Lyon): Mr. Bechtold, I believe you said that you do not find among the compounds called for in the Fredericks patent barium chro-

(Testimony of Ira C. Bechtold.)

mate. You do find that barium is one of the metals that is listed, do you not? A. Right.

Q. And you do find that in addition to the various salts mentioned Fredericks says "and other salts"? A. Right.

Q. Is barium chromate another salt of barium?

A. Yes.

Q. Then to that extent, at least, it is [330] within the called for materials of the Fredericks patent, is that correct? A. Yes.

Q. Do you agree that barium chromate in sufficient quantity would dye the drippings of a candle yellow? A. I don't know.

Q. You didn't, in making up your Exhibit 18 wax pads, you didn't make one with ferric acetate, did you? A. Yes.

Q. Which one is it?

A. Well, I will have to change that. You said in Exhibit 18?

Q. That is right.

A. No, there is none in Exhibit 18.

Q. Ferric acetate would be red, wouldn't it?

The Court: That is, introduced into the wax?

Mr. Lyon: Right.

The Witness: Ferric acetate?

Q. (By Mr. Lyon): Ferric acetate is a red powder, isn't it?

A. May I refer to my references?

The Court: How much longer will you be?

Mr. Lyon: I have got to go through five of these

(Testimony of Ira C. Bechtold.)

things. If he has to look up every one in the book, it will take a little while. [331]

The Witness: Do you refer to a simple ferric acetate?

Q. (By Mr. Lyon): If you have to make any qualifications, you do so. You are the chemist.

A. I do not believe there is such a compound as ferric acetate.

Q. Iron acetate? A. Which one?

Q. Any one.

A. I do not know what the color would be.

The Court: Do you mean you are going to go through the whole 146 of these things?

Mr. Lyon: No, your Honor. Just the ones on page 13 of the interrogatories.

And in view of the fact that the witness says he doesn't know, I am not even going to bother to do that.

I will ask you one thing, though:—

Q. Ferric hydroxide would be one of the chemicals listed in the Fredericks patent, would it not?

The Court: Chemicals?

Q. (By Mr. Lyon): One of the metallic salts listed in the Fredericks patent? A. Yes.

Q. It does call for iron salts and it calls for hydroxides? A. Yes. [332]

Q. And it does say to mix the same with oleic or stearic acid, does it not?

I call your attention to line 40, page 2, of the Fredericks patent:

“In this saturated solution”——

(Testimony of Ira C. Bechtold.)

The Court: Which column?

Mr. Lyon: Column 2, beginning line 43:

“In this saturated solution is dissolved another vehicle such as oleic or stearic acids to the saturation point by heating. To the melted material, such as paraffine or stearine, or their combinations, as well as the other candle materials,” and so on.

So it, therefore, calls for the incorporation of this material in oleic or stearic acid, does it not?

The Witness: No. It says——

Q. (By Mr. Lyon): “Should a red colored flame be desired, a metallic salt such as strontium chloride or lithium chloride is dissolved in one of the vehicles, such as an alcohol, to a saturated solution. In this saturated solution is dissolved another vehicle such as oleic or stearic acid * * * ”

Doesn't that mean that you put the strontium chloride together with oleic or stearic acid?

A. Not until another step has been completed.

Q. What step? A. I read:

“To the melted candle material, such as paraffine or stearine, or their combinations, as well as the other candle materials or their combinations, which are named herein, is added a small amount of the saturated combination, in small quantities, according to the amount of color desired in the flame * * * ”

Q. Now, Mr. Bechtold, are we quibbling or does the Fredericks patent tell you to combine your coloring material, whatever it is, with oleic or stearic acid? A. In another vehicle, yes.

Q. Oleic or stearic acid is an oil, is it not?

(Testimony of Ira C. Bechtold.)

A. No.

Q. What is an oil?

A. Oleic acid is an acid, an organic acid.

Q. A fatty acid, is it not?

A. Yes, it is one of the fatty acids.

Q. Oils include fatty acids, do they not?

A. Not necessarily.

The Court: Is it used in making candles?

The Witness: I am not a candlemaker.

Q. (By Mr. Lyon): Well, I take it that is the basis for stating, then [334] that the ferric hydroxide in combination with oil is not shown in the Fredericks patent in that you do not consider oleic or stearic acid oil, is that right?

A. No, that is one reason.

Mr. Lyon: I have no further questions

The Court: No more questions?

Mr. Lyon: No.

The Court: Step down.

Mr. White: I would like to have the witness' other answer to that. He said that is one reason. May we have the second reason, please?

Q. (By Mr. Lyon): Do you have another reason? A. Yes.

The lines you referred to, page 2, column 2, lines 38 on, refers to strontium chloride or lithium chloride, not ferric hydroxide in combination with oil.

Q. I see. You object to my going from one part of the patent to another, is that it? A. Yes.

Q. Referring again to this dictionary, "The Condensed Chemical Dictionary," which you agreed

(Testimony of Ira C. Bechtold.)

with a minute ago: "Oleic acid (oleinic acid; 'red oil')"

What does red oil mean there when used in the definition in this chemical dictionary of oleic acid?

A. That is a colloquial term used in the past to describe oleic acid. I think it was known once also as turkey red oil.

Q. Now turkey red oil is a sulfonated oil. I happen to know that because I had a patent on it.

Would you agree with this in the same dictionary with respect to uses of oleic acid:

"Uses: soap stock; manufacture of oleates; ointments; polishing compounds; oiling wool; cosmetics; fluid gauges; ore flotation." A. No.

Mr. Lyon: That is all.

The Court: Do you have any more questions of this witness?

Mr. White: No, your Honor.

The Court: You are excused.

(Witness excused.)

The Court: We are recessed until 10:00 o'clock tomorrow morning.

(Whereupon, at 5:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Friday, March 23, 1956.) [336]

The Court: Do you have further testimony?

Mr. White: Very little, your Honor.

The Court: Very well.

No ex parte matters?

The Clerk: No, your Honor.

Mr. White: Before recalling Mr. Wilson, your Honor, I notice in checking the record that evidently I did not read into the record Plaintiff's Interrogatories 15 and 19, and the answers thereto. I would like to ask permission for the reporter to copy those into the record, please.

The Court: If you haven't, that will be the order. The order will be to copy question 19 and the answer, and question 15 and the answer.

I was under the impression that you had read 15, because I recall——

Mr. White: I believe, your Honor, I did so indirectly by referring to it in talking about the answer to another interrogatory.

The Court: Yes, I think now that I recall, that you used that as the basis of one of your questions in the cross examination of Mr. Muench.

Mr. White: That is right, your Honor.

The Court: So that will be the order, to copy 15 and the [340] answer, and 19 and the answer, into the record as if they were read as this time.

(Interrogatories 15 and 19 and the answers thereto appear in the following words and figures, to-wit):

Question 15: (a) Does defendant contend that a candle made according to any of the individual descriptions and showings in any of the following patents, to wit,

Harnich, United States, 1,596,017.

Minrath, United States, 1,608,518.

Funke, United States, 1,701,844.

Nelson, United States, 1,908,044.

Fredericks, United States, 2,184,666.

Turner, United States, 2,196,509.

Sterry, British, 95.

Ascough, British, 3,478.

Smith, British, 5,902.

Field, British, 122.

Hausamann, German, 1,547,209.

will upon burning form in an unpredictable succession and to any considerable extent on the body of the candle different colored drippings colored differently from the candle body?

(b) If the answer to the foregoing (15a) is in the affirmative, state which patent or patents discloses a candle that will so perform upon burning.

Answer: (a) Yes. (b) Nelson and Fredericks.

Question 19: Which of such coloring compounds as defendant may list in answer to Interrogatory 17, has defendant actually used in either its "Make-a-Rainbow" or "Cascade" or any other similar commercially sold candles?

Answer: Copper acetate:

Mr. White: I should like to make sure at this time that all of plaintiff's exhibits marked for identification are admitted in evidence.

The Court: I don't know. That red candle with all the gobbledy-gook on the outside, I don't believe anyone testified to it.

The Clerk: This one?

The Court: Somebody made a statement as to

what that was. I don't believe anyone testified about it.

The Clerk: It was admitted.

Mr. White: Did I refer to defendant's exhibits?

The Clerk: No.

The Court: Plaintiff's.

Are those defendant's?

Mr. Lyon: Yes.

The Court: If plaintiff's exhibits are marked for identification and have not heretofore been admitted, they are admitted now. [341]

Mr. Lyon: I am quite sure that all of the defendant's are in, but just to make sure, may we have a protective order?

The Court: Yes.

The Clerk: 18-A to 18-L were admitted.

Mr. White: Yes, those were the last referred to.

Mr. Wilson, will you take the stand.

LESTER F. WILSON

the plaintiff herein, having been previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

Q. (By Mr. White): On page 119 of the transcript I read the following question by the court and answer by the witness, Mr. Muench.

"The Court: Is this the kind of candle stock that is non-drip or generally referred to as the drip stock?

"The Witness: The stock isn't such that it would

(Testimony of Lester F. Wilson.)

be non-drip. There aren't any candles made that in the draft really won't drip.

"These candles are made particularly, as all these supposed multi-colored drip candles, with a small wick so they haven't the capacity to carry the amount of wax. [342]

"Any of these candles in a room that has no draft—for instance, with the so-called drip candles—if they are put in with a large wick, won't drip at all if there is no draft, so they are not really a dripping candle unless the wick is small."

Mr. Wilson, do you agree with that statement?

A. Yes, sir.

Q. Is it factually true? A. I think so.

Q. On pages 119 and 120 we find the continuing questions by the court and answers by the witness.

"The Court: That is what makes it drip?

"The Witness: That is what makes it drip.

"The Court: The size of the wick?

"The Witness: The size of the wick. If there is a strong draft they will drip anyway with a large wick because in burning the flame is supposed to stand upright. If there is a draft like you have here blowing the flame sideways, it heats the edge of the candle and melts down that edge and allows the wax to drip out, whether it is white or colored or anything else."

Mr. Wilson, do you agree with Mr. Muench's statement concerning the effect of the wind? [343]

A. Yes.

Q. At page 95 and following in the record we

(Testimony of Lester F. Wilson.)

have reference to correspondence between the I. S. & S. Products Coordinators and Mr. Muench concerning an infringement charge made by the plaintiff against I. S. & S. Mr. Wilson, do you know what response I. S. & S. Products Coordinators made to your charge of infringement?

A. They discontinued manufacturing the candle.

Q. Mr. Wilson, have you had any difficulty in obtaining any of the chemicals used in all of your exhibits which have employed chemicals?

A. No.

Mr. White: That is all. [344]

The Court: Cross examine.

Cross Examination

Q. (By Mr. Lyon): Mr. Wilson, are you familiar with the drip candle that has been manufactured, advertised and offered to the trade by the Penn Wax Works of Philadelphia, Pennsylvania?

A. I have heard of it.

Q. Do you charge that to be an infringement of your patent?

Mr. White: That is objected to as entirely irrelevant and immaterial.

Mr. Lyon: It is just as relevant and material as whether I. S. & S. discontinued making candles.

Mr. White: I. S. & S. discontinued pursuant to a request to discontinue.

Mr. Lyon: Here is another company that hasn't discontinued.

(Testimony of Lester F. Wilson.)

The Court: I do not know whether it has or has not. It is not in evidence.

Mr. Lyon: I have a question before the witness.

The Court: The question is, does he charge their candle to be an infringement.

Mr. Lyon: That is right.

The Court: The objection is sustained on the ground that there is no foundation laid. I do not know what their [345] candle is.

Mr. Lyon: I asked him if he is familiar with it.

The Court: He is familiar with it but what difference does that make? I am the one who has to decide that.

Mr. Lyon: I will ask a few more questions, then.

The Court: He may know whether their candle is but I do not.

Q. (By Mr. Lyon): The Penn Wax Works of Philadelphia, Pennsylvania, is manufacturing and offering for sale and advertising a candle having a plain exterior but which drips on burning with successively different colored drippings, does it not?

A. I don't know personally.

Q. Do you happen to know——

A. I haven't seen their advertisements.

Q. Do you happen to know whether the Ajello Company of New York City is manufacturing a candle which, upon burning, will drip successively different colored drippings?

A. I don't know at the present time, no.

Q. Do you know at any time?

A. Several years ago they did.

(Testimony of Lester F. Wilson.)

Q. Would your answer be the same as to the Penn Wax Works?

A. All I know is hearsay. I have never seen the candle. [346]

Mr. Lyon: That is all.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. White: The plaintiff rests.

The Court: Does the defendant?

Mr. Lyon: Mr. Muench.

NORBERT C. H. MUENCH

recalled as a witness in surrebuttal, having been previously duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lyon): Mr. Muench, at the present time is the Penn Wax Works of Philadelphia, Pennsylvania, manufacturing and offering for sale and advertising in the trade publications a candle which, upon burning, will drip different colored waxes successively? A. Yes, they are.

Q. Would your answer be the same as to the Ajello Company of New York City?

A. Same answer.

Mr. Lyon: No further questions.

The Court: Step down.

(Witness excused.)

* * * * *

[347]

The Court: Any *ex parte* matters?

The Clerk: No, your Honor.

Case No. 15273-PH, Wilson v. Muench-Kreuzer Candle Company. Further trial. All parties present, your Honor.

The Court: Mr. White, you had something additional to say.

Mr. White: Counsel has made reference to the 10 metallic salts listed in the answer to Interrogatory 18 in reference to the Fredericks and Nelson patents, and I believe the statement was, in effect, that I had admitted that those were wax coloring materials.

That is not quite true. All I said was that that is what the defendant said.

Mr. Lyon: I thought you said you would give us credit for it.

Mr. White: I will give you credit for having answered as to 10 out of 146 compounds.

Now whether they do or don't is something else again. The only one which defendant admitted having ever used in any of its multi-colored drip candles was acetate.

The Court: That is the copper?

Mr. White: I beg your pardon. Copper acetate.

The Court: And that is the only one in all of these [396] exhibits here of metallic salt that is used and that produced a color?

Mr. White: No.

Mr. Lyon: No. Copper chloride was also used in Exhibit E. It was the paler of the two greens.

The Court: A copper derivative.

Mr. Lyon: Yes.

The Court: These other exhibits here are aniline, is that right?

Mr. Lyon: No, your Honor.

The Court: Exhibit 13-A?

Mr. Lyon: 13-A is aniline.

The Court: Yes.

Mr. Lyon: Exhibit D is formed with——

The Court: I have a note of it here.

Mr. Lyon: That was the Sheppard Chemical Company salts that Mr. Muench used in making up that exhibit.

Your Honor will recall yesterday Mr. Bechtold agreed with me that we could get a red or a blue from copper sulphate and a red from iron oxide, ferric oxide, Prussian red. We didn't have that in any of the exhibits but Mr. Bechtold stated that if you used enough of those you could.

The Court: Now this D-2, I have a note here that that is made after the Nelson patent.

Mr. Lyon: That is the Du Pont dichlopentadienyliron [397] salts, copper chloride, copper acetate and cadmium sulphide.

The Court: Very well. Go ahead, counsel. [398]

Mr. White: As to that exhibit, the du Pont dichloro et cetera compound, cadmium sulfide had to be found by going outside of Nelson.

Counsel referred, I believe, to the Byron Jackson-Wilson Elevator case, the barn door latch and elevator latch, and as I recall counsel's statement the barn door latch was adjudicated to anticipate the elevator latch.

In that case the barn door latch at least had been in existence and was workable.

Reference was made to this question of infringement or non-infringement of claim 1 by the candle made in accordance with Defendant's Exhibit N. I believe the argument was advanced that if one applies this muetter farben, which is dye in wax, to the outside of this taper No. 2, then one cannot say that that dye had not been dissolved in the candle body wax.

As I recall—I stand subject to correction on this—defendants' first Make-a-Rainbow candle was manufactured by applying muetter farben directly to the wick. Defendant did not deny infringement there.

Now, during my questioning of Mr. Muench yesterday, I believe we came to an agreement that whether we call it the body of the candle or candle stock——

The Court: If you turn around and face the other way, the reporter will be able to hear you.

Mr. White (Continuing): If we regard the white wax substance of the candle as the candle body, or Mr. Muench preferred to regard it as candle stock, it extends from the wick to the outer surface of the candle. Therefore, if we have muetter farben on the wick, or on the taper, they amount to the same thing. And in reference to the terminology of claim 1, if the first Make-a-Rainbow drip candle was an infringement, the latter one most certainly must be.

Counsel, I believe, stated——

The Court: I didn't get that point very clearly,

except your last statement that if the first one was an infringement, the process of Exhibit N must certainly be. Why?

Mr. White: The argument, as I understand it, your Honor, against infringement is that when one puts this meutter farben, which is coloring material, on taper No. 2——

The Court: It is then dissolved in the body of the candle?

Mr. White: The theory apparently is that the wax content of the muetter farben becomes a part of the body wax or the candle stock.

Well, it is precisely the same with defendant's first Make-a-Rainbow candle, because there the dye was in some wax, and it was applied to the wick an eighth of an inch in closer, but that was just as much, if any, a part of the candle stock or the candle body as it is here. It makes no [400] difference.

Now, I believe counsel stated, with reference to Nelson and Fredericks, whether valid for coloring the flame I don't care——

The Court: Whether what—valid?

Mr. White: Whether valid for coloring flame I don't care.

The Court: He still maintains that they are anticipation?

Mr. White: Yes. It doesn't make any difference whether they do what they say that do or not.

The Court: All right.

Mr. White: I think it is pertinent that we just have reference to Judge Learned Hand's—— [401]

The Court: A little law always helps in a lawsuit.

Mr. White: —statement of one of the elementary principles and doctrines of patent law appearing in a well-litigated case of *Dewey & Almy Chemical Company, et al., v. Mimex Company, Inc.*, Circuit Court of Appeals for the Second Circuit, decided January 5, 1942, appearing in 1244 F(2d) page 986.

In that case Judge Hand made this statement——

The Court: My bailiff will get the book and I will follow you a little closer.

Mr. White: Very well, your Honor.

Your Honor, I am referring to the pocket edition series of lawbooks, *United States Patent Quarterly*, so I am sorry I cannot direct you to the page.

The Court: Are the headnotes the same as they are in *West*?

Mr. White: I am referring now to Headnote No. 2.

The Court: “Patent No. blank for latex seal for cans and containers held invalid for lack of invention”?

Mr. White: Apparently they are not the same, your Honor.

As the decision is printed here, I am referring to the beginning of the second from the last long paragraph. They are both long paragraphs, but it starts, “No doctrine of patent law.”

The Court: Yes, I have it. [402]

Now before you read that, let me see who was trying to do what to whom here and why.

That is the patent from which this headnote would be taken, “A prior patent or other publica-

tion to be an anticipation must bear within its four corners adequate directions for practice of the patent invalidated and if it offers no more than a starting point for further experiments or its teachings will sometimes succeed and sometimes fail or it does not inform the art without more how to practice the new invention, it is not anticipation." Is that the principle?

Mr. White: That is the principle, your Honor. It is not just the language that I have here, though.

The Court: Very well. I shall follow you. Go ahead.

Mr. White: It is there stated that it must bear within its four corners. Now that means what the patent says on its face, as I represented this morning.

It is nothing that will permit of experimentation to find out what it is or what it might do. And the court stated:

"If he earlier disclosure offers no more than a starting point for further experimentation—" Now that is all certainly that Fredericks and Nelson did.

"—if its teaching would sometimes succeed and sometimes fail—"

That is at least what happened here. [403]

"—if it does not inform the art without more how to practice the new invention—"

The are here didn't say one word about drip candles or the formation of wax drippings or anything of the sort.

"—it has not correspondingly enriched the store of common knowledge and it is not an anticipation."

The Court: Well, how about this statement in that same paragraph:

“Tested by this doctrine Newton’s disclosure was inadequate for several reasons—”

I do not know who Newton was here.

Mr. White: The court was concerned about the sufficiency of that Newton British patent.

The Court: Which was a prior patent?

Mr. White: Yes.

The Court: All right.

“We do not rely upon the fact that he was not concerned with making a sealing composition but only with finding a carrier for pigments effectively to print or stain fabrics. We shall assume that if his process would have uniformly resulted in the patented seal it would have been a good anticipation even though it took a second authentic act of creative imagination to discover [404] its fitness for the new use. The difficulty lies not in its failure to anticipate the new use but whether he actively disclosed or failed to disclose.”

Let me finish reading it counsel. (Examining citation.)

The Court: He goes on to say:

“Even if he had remedied the use of gum with pigments and even if his directions to grind the pigments fine had been a direction to use the equivalent of a colloid mill, success or failure would have remained the sport of accident, as we have seen. It was hit or miss for the best of reasons. Newton was not aiming at the target.

That alone would have been enough.”

Mr. White: And that is precisely, your Honor, the situation we have here.

The Court: Very well.

Mr. White: That concludes my remarks, your Honor. Thank you.

The Court: I would like to ask Mr. Lyon a question, and maybe Mr. White too.

In the Nelson patent upon which you rely it states in column 1 at line 11:

“As is well known a candle consists of two component parts, namely, the body and the wick.” [405]

Therefore everything that is not wick is body.

In the plaintiff's patent in Claim 1 he says that he claims a drip candle comprising a waxlike body, different wax soluble dyes normally concealed within the interior of the body at different locations longitudinally thereof and normally undissolved in the wax of said body, and so forth, and said dyes dissolving in the melted wax of the body to perform multi-colored drippings as the candle progressively burns.

Now if a wax is a part of the body it is not in the body.

Mr. Lyon: Are you asking me?

The Court: I am asking you.

Mr. Lyon: I think, your Honor, that if the wax is prepared in the manner in which the defendant prepares it, that is, by first dissolving the wax, dissolving the dye in a body of wax to form this mother color, it is ridiculous to say anytime thereafter that the dye is not normally dissolved in the wax. It is predissolved.

The Court: Very well. I am ready to announce my decision.

The purpose of the invention of Nelson and of Fredericks is stated in the body of their patents. The Nelson patent is headed, "The Art of Making Candles," but it states that the purpose of his present invention is to impart a distinctive color to the flame. [406]

The Fredericks patent is entitled, "Colored Flame Candle," and he states:

"This invention relates to a colored flame candle and consists in applying color-producing metallic salts to the candle wick in a limited straight and a spirally extending path, with the aid of one or more vehicles in such manner that when the candle is lighted it burns with a colored flame."

I don't think there is any doubt but what those two patents, as well as the Funke patent, had for their purpose the object of producing a colored flame, and not of producing an ornamental candle after or during the time it was burning.

In the Fredericks patent, upon which the defendants rely, it does set forth on page 2 the color producing metallic salts, and so forth. And I understand from counsel's contention that there is stated in there an acetate which is not necessarily a metallic salt. However, in the claims he mentioned nothing, in each one of them, claim 1, 2, 3, and 4 of the Fredericks patent, he does not mention any kind of a coloring material except that in each one he says he claims a metallic salt.

And insofar as Nelson is concerned, the salts

which he described—he does not describe aniline—he describes different kinds of salts, so I think under the doctrine, which is best pointed out here in the Dewey vs. Almy case, [407] but which is also borne out by the Mohr, and the Flakice case, which were cited this morning, that these two patents, as well as the several others upon which the defendant has relied, but principally the Nelson and the Fredericks patents, must be viewed with the idea that they were attempting to disclose a useful invention for some purpose other than that for which the plaintiff has his purpose, as stated in the first paragraph of his invention.

I realize that there is a very great restriction upon the specifications in a patent, and while there are some authorities to the effect that you can only consider what is in the claim, nevertheless I think the rule still prevails that when you come to interpreting a claim, that you may have recourse to the specifications that are in the patent, to ascertain what was meant by the claims in the patent.

The two things that were sought here in the Wilson patent, No. 1, was the matter of getting the multi-color in the candle as it burned, but the other one, which was just as important, it seems to me, was the concealment of it.

He states in the first paragraph: “This invention has for its general object to provide a novel and distinctively unique drip candle”——

Incidentally, I may say that none of the other patents refer to a candle which is made for dripping purposes. [408] Continuing reading:

—“distinctively unique drip candle characterized by its ability to form multi-colored drippings notwithstanding the fact that to all outward indications, and even upon closest inspection, the candle may appear the same as any ordinary candle, the drippings from which correspond to the color of the candle.

“The usual drip candle is of course made of a wax or body material,” and so forth.

And then he refers to a wick and he goes on to describe the placing of his aniline or other suitable dyes in the wick.

Keeping that in mind and reading claim 1, it seems to me that what is meant by claim 1, the phrase “normally undissolved in the wax of said body” means that it is normally undissolved in the wax of the body so that even on closest inspection you cannot tell that there are any colorings in the candle which will drip.

Therefore, it would cover any candle that was not colored all the way out.

So my conclusion is that the plaintiff's patent is valid.

I don't think there is any doubt about claims 2, 3, 4, 5, and 6. The big trouble is No. 1, to determine whether or not claim 1 is valid, and I now determine that it is valid, in [409] view of what I have said. And it necessarily follows that the defendant's candle manufactured in the manner as set forth and shown in Exhibit N is an infringement of claim 1, and the plaintiff is entitled to judgment.

The plaintiff complains here and asks for treble damages.

I do not think that this is a case where the law contemplated that such a drastic remedy should be invoked or imposed.

I suppose by pressing inferences much further than appears to me to be just in this case, one might be able to guess or suppose that maybe Mr. Muench knew about this patent here and followed the plaintiff's teachings. But I don't think that it was that type of conduct which Congress intended to penalize by providing for treble damages, which after all is a very harsh remedy.

It is not the type of conduct such as, for instance, in another case—and I cite it only to illustrate what I have in mind, as to where such a penalty should be invoked—where the defendant took the object of plaintiff's invention and he went to machine shop after machine shop and said, "Make something as near as you can to this, but not quite like it, if you can."

Now, that is the type of conduct which I think is intended to be covered by the treble damage section. [410]

There remains the question of damages. The parties have put on no evidence of that, except the number of candles, and I haven't read that section lately about damages. What does it provide?

It provides something about reasonable——

Mr. Lyon: The normal thing would be a reference to a master for an accounting.

The Court: Well, that is the usual custom.

Mr. Lyon: May I inquire one thing? Has your Honor overlooked or has he decided the question of the necessary party plaintiff? The Victrylite Company, the exclusive licensee in this matter?

It is our position that this case cannot——

The Court: They were the exclusive licensee only on one type of candle. Let me see that agreement. What is that exhibit?

Mr. White: Exhibit 5, your Honor.

The Court: I don't think that it is the exclusive licensee—in the first place, it is not an exclusive license, is it?

Mr. White: No, your Honor, it is not.

Mr. Lyon: It is exclusive except for a reservation of a personal license in the plaintiff.

The Court: “* * * Licensor hereby grants to licensee an otherwise exclusive license under [411] said patent, limited, however”——

Wait a minute.

“Reserving in himself, his successors and assigns a single and indivisible right of manufacture, use and sale of candles embodying the invention of said patent, licensor hereby grants to licensee an otherwise exclusive license * * *”

I don't believe that this is an exclusive license. I think under the terms of this contract that—of course, that isn't before me for adjudication at this time in connection with this matter, but it would appear to me offhand that if the plaintiff attempted to license somebody else to do the things which he has licensed Victrylite Candle Company to do, that Victrylite would be entitled to restrain the plaintiff

and to restrain the other people, because he reserves in himself, his successors and assigns a single and indivisible right of manufacture. The indivisible right of manufacture, I take it, is a limitation upon his rights to license somebody else to make a candle core. But he has the right to license somebody else to make a candle from a dyed wick. [412]

Mr. White: No rights were granted, your Honor, under Claims 2 to 6 of the Wilson patent.

The Court: I do not see how they could because 2 to 6, Mr. White, covers wicks and here he is reserving to himself, he is not granting to the other party, the right to have dyed wicks. He says that the exclusive license is limited, however, to the manufacture, use and sale of candles having dyed cores as distinguished from dyed wicks.

Now 2, 3, 4, 5 and 6 relate to dyed wicks, do they not?

Mr. White: That is right.

The Court: And No. 1 is the only one that could be a dyed core.

Mr. White: That is right.

Mr. Lyon: The Independent Wireless and Telegraph Company v. RCA, 269 U. S. 459, Judge Taft stated——

The Court: Let me see it. It is not that I doubt what you say, counsel, but so many times I can have a better understanding of what the case is about if I look at it.

Mr. Lyon: I have a lot of them here.

The Court: What does he say and where does he say it?

Mr. Lyon: At page 361 of L. Ed., he said, "Both the owner and the exclusive licensee are generally necessary parties in an action in equity."

The Court: I think that would be correct, counsel, if the Victrylite Company were the exclusive licensee, but they [413] are not the exclusive licensee.

Mr. Lyon: Do you think that this decree affects their rights?

The Court: No, I don't think this affects their right at all.

Mr. Lyon: Suppose you had held the patent invalid, would that decree affect their rights to be the exclusive person who could put dye on the core of a candle? I think it would.

The Court: If I held this decree to be invalid they have a decree in their case adjudicating that it is valid and they have in my judgment probably estopped themselves from claiming that they would not owe the plaintiff any royalty under candles that they manufactured.

Mr. Lyon: But, your Honor, can't you see that if you had held this patent invalid then the grant which has been made to them of a monopoly to form this kind of candle would be extinguished necessarily involved in a decree of this court is an adjudication of their rights to a monopoly. Because assuming that your decision becomes a final decision, if you had destroyed that patent you would have destroyed the monopoly which has been granted to the Victrylite Candle Company. In *Shields v. Barron*,

the leading case on the subject of who are indispensable parties——

The Court: That is not *Shields v. Barron*, it is *Shields* [414] *v. Barrow*. I have cited it hundreds of times.

Mr. Lyon: What they said there was, "Persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

Now if you had decided this patent were invalid you would have destroyed the *Victrylite* Company's rights to be the only person to put out a candle such as Exhibit N.

The Court: Now *Shields v. Barrow* is discussed at length by a Ninth Circuit case, the name of which escapes me for the moment, but in which the Ninth Circuit points out that what is meant by an indispensable party is this, that there is a necessary party, a conditionally necessary party and an unconditionally necessary party. An indispensable party is an unconditionally necessary party.

That is to say, that the rights of the people before the court cannot be adjudicated without their presence, and the rights of the people before this court now can be adjudicated without the presence of *Victrylite*.

Mr. Lyon: All I am asking, your Honor, is to rule on it.

The Court: I have ruled against you.

Now what about the matter of damages? There was an exhibit here showing the total number of candles which the [415] plaintiff sold, and there was an exhibit showing the total number of candles which the defendant sold.

Mr. Lyon: No.

Mr. Muench: That was from Victrylite.

The Court: I thought it was the total number that the defendant sold.

Mr. White: You had asked, I believe, your Honor, of Mr. Muench as to how many of the first Make-a-Rainbow colored candles he had made and sold, and Mr. Muench said he didn't know but I think he just guessed at a possible figure of 100,000.

Mr. Muench: How many did you say, Mr. White?

Mr. White: 100,000.

Mr. Muench: It wasn't far from that. I found out since that up until September 5, 1952, we had made 115,172 pieces.

Mr. White: Then there was at least evidence of damage in the showing of what happened to the plaintiff's candle sales starting and continuing after the defendant's entry into the multi-colored drip candle field.

The Court: What is that section of the Code?

Mr. Lyon: 70.

The Court: What is the section of the United States Code?

Mr. Lyon: 35 U. S. Code Section 70. It might just possibly be 71 but I am almost certain it is 70. [416]

The Court: There is no 70. It is U. S. 3542, then it jumps to 101.

Mr. Lyon: 70 has been repealed and if you will hand it to me I will find it.

The Court: I can probably save time by looking at the index.

Mr. Lyon: Damage is Section 284.

The Court: What is the desire of the parties? Do you wish the matter to be referred to a Master for the ascertainment of damages, or do you wish the court to take testimony as to what a reasonable royalty would be?

Mr. White: Mr. Lyon suggested reference to a Master, which I think would be satisfactory to the plaintiff.

Mr. Lyon: It is usual in these cases to withhold the question of damages if there is an appeal which would stay the accounting, and so on.

The Court: That is true, but here is what I have in mind in connection with this case: It appears that it might be quite possible that Mr. White would accept a statement from the Muench-Kreuzer Candle Company of the number of candles they have sold. If that is the case then the court can receive evidence of a reasonable royalty and you can save the cost of an extensive reference.

Now are you willing to accept Mr. Muench's statement that he made just now as to the number he sold before he discontinued [417] the dyeing of the wick?

Mr. White: 115,000, was it?

Mr. Muench: 115,172.

I made that figure some time ago and it checked well then, Mr. White.

Mr. White: That is a point, your Honor, on which I would like to consult with my client, but if we can leave this matter of determination of damages in some condition that would permit Mr. Lyon and me to consider the total figures to be submitted, if he cares to, by Mr. Muench, why I would be happy to proceed on that basis and to save the expense of a reference.

The Court: Then the decree as to validity and infringement will be as I have indicated, and the matter of reference to a Master or as to the ascertainment of damages will be as agreed upon by the parties, or if they cannot agree upon further order of the court.

Mr. White: That would be satisfactory, your Honor.

The Court: Is that agreeable, Mr. Lyon?

Mr. Lyon: Yes, sir.

The Court: Very well.

Mr. White: Your Honor, there was included in the prayer I believe a request for an order for an award of attorney's fees.

The Court: Each side will pay their own costs.
Court is adjourned.

(Whereupon, at 3:00 o'clock p.m., court was adjourned.)

[Endorsed]: No. 15,132. United States Court of Appeals for the Ninth Circuit. Muench-Kreuzer Candle Co., Inc., a corporation, Appellant, vs. Lester F. Wilson, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 18, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,132

MUENCH-KREUZER CANDLE CO., INC., a
corporation, et al., Appellant,
vs.

LESTER F. WILSON, Appellee.

STATEMENT OF POINTS FOR DEFENDANT-
APPELLANT

The points of error of the District Court which defendant intends to urge on Appeal from the Judgment of the Court in favor of plaintiff in the above-entitled action are as follows:

I.

The District Court erred in concluding that

Claims 1 to 6 and each of them of the patent in suit No. 2,464,361 are good and valid in law.

II.

The District Court erred in failing to find that Patent No. 2,464,361 and each of the claims thereof are invalid and void for want of invention over the prior art.

III.

The District Court erred in failing to find that Patent No. 2,464,361 and each of the claims thereof are invalid and void and unenforceable for having been procured by a fraud perpetrated upon the United States Patent Office by reason of a false representation made in plaintiff's brief on Appeal to the Patent Office Board of Appeals that "The metallic salts and the like employed for flame coloring in the references are not dyes, they are not wax soluble, and they would not affect the color of drippings if the candles were of the drip producing type."

IV.

The District Court erred in concluding that candles manufactured by defendant-appellant since September 5, 1952, infringe Claim 1 of Patent No. 2,464,361.

V.

The District Court erred in concluding that "Examination of the file history of the Wilson patent application reveals no estoppel against plaintiff's assertion of validity and infringement."

VI.

The District Court erred in failing to conclude that Claim 1 of Patent No. 2,464,361 is limited to a candle in which the dyes are "normally undissolved in the wax of said body" and hence not infringed by candles as manufactured by defendant-appellant since September 5, 1952, in which the dyes, prior to application to the taper, are first dissolved in wax.

VII.

The District Court erred in concluding that the prior art relied upon by defendant does not support defendant's contentions of invalidity in view of the rules and laws as laid down in *J. A. Mohr & Sons vs. Alliance Securities Co.*; *Standard Oil Company vs. Same* (Ninth Circuit Court of Appeals 1926), 14 F.2d 799; *Flakice Corporation vs. Liquid Freeze Corp.*, 130 F.Supp 471 (D.C.N.D. Cal., 1955); *Dewey & Almy Chemical Company, et al. vs. Mimex Company, Inc.* (Second Circuit Court of Appeals) 124 F.(2d) 986.

VIII.

The District Court erred in concluding that Victrylite Candle Company is neither a necessary nor indispensable party in this Action.

IX.

The District Court erred in concluding that plaintiff is entitled to an injunction and an accounting for profits and damages by reason of defendant's infringement.

X.

The District Court erred in failing to find that all candles drip.

XI.

The District Court erred in refusing to find, as requested by defendant, that certain of the metallic salts listed in the Fredericks Patent No. 2,184,666, when placed in sufficient quantities on the wick of a candle which drips, will color the drippings of said candle, specifically including copper acetate, cuprice chloride, copper hydroxide and ferric oxide.

XII.

The District Court erred in failing to find, as requested by defendant, that the use of analine dyes, both in the wick and as a dye to color the core of a candle a different color than the main body of a candle was old in the art prior to the time when plaintiff made the invention embodied in the patent in suit.

XIII.

The District Court erred in finding that none of the prior patents or publications relied upon by defendant refers to a drip candle, or reveals any contemplation of making a candle which characteristically is of a wax dripping type.

XIV.

The District Court erred in failing to find that since 1941 defendant has manufactured and sold, and advertised in its catalog its Star-Pillar candles

in which wax colored differently than the exterior of the candle drips upon burning.

XV.

The District Court erred in failing to find the German Patent 157,209 of December 28, 1904 discloses a candle which upon burning drips a wax over the exterior of the candle colored differently than said exterior.

XVI.

The District Court erred in failing to find that Great Britain Patent 95 of 1871 discloses a candle which upon burning drips a wax over the exterior of the candle colored differently than said exterior.

XVII.

The District Court erred in failing to conclude that the patent in suit discloses a mere multiplication of defendant's Star-Pillar candle, or of said candle of said German patent No. 157,209 or of said British Patent No. 95 of 1871 and hence no invention over the prior art.

Dated this 18 day of May, 1956.

LYON & LYON,

/s/ By CHARLES G. LYON,

Attorneys for Defendant-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 22, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DEFENDANT-APPELLANT DESIGNATION
OF PORTIONS OF THE RECORD

To the Clerk of the United States Court of Appeals for the Ninth Circuit:

Please include in the printed record in the above-entitled case now on Appeal to this Court the following:

1. The Complaint, filed March 6, 1953.
 2. Answer, filed April 8, 1953.
 3. Stipulation dated August 26, 1953.
 4. Findings of Fact, Conclusions of Law and Judgment dated April 12, 1956.
 5. Notice of Appeal dated April 19, 1956.
 6. Bond on Appeal, filed April 23, 1956.
 7. Supersedeas filed April 23, 1956.
 8. Transcript of Trial pages 4-347, 396-419.
 9. The following exhibits:
 - Plaintiff's Exhibit 1, Wilson Patent 2,464,361.
 - Plaintiff's Exhibit 5, Victrylite License Agreement.
 - Plaintiff's Exhibit 6.
 - Plaintiff's Exhibit 10.
 - Plaintiff's Exhibit 11.
 - Plaintiff's Exhibit 15.
 - Defendant's Exhibit A, prior art patents.
 - Defendant's Exhibit B, Stipulation.
- The following exhibits to be treated as physical exhibits and not part of the printed record:
- Plaintiff's Exhibit 2.

Plaintiff's Exhibit 3.
Plaintiff's Exhibit 4, 4A-D.
Plaintiff's Exhibit 7.
Plaintiff's Exhibit 8.
Plaintiff's Exhibit 9.
Plaintiff's Exhibit 12.
Plaintiff's Exhibit 13.
Plaintiff's Exhibit 14.
Plaintiff's Exhibit 16.
Plaintiff's Exhibit 17 A-B.
Plaintiff's Exhibit 18 A-L inclusive.
Defendant's Exhibit C.
Defendant's Exhibit D, D-2.
Defendant's Exhibit E, E-2, E-3.
Defendant's Exhibit F.
Defendant's Exhibit G, G-2.
Defendant's Exhibit H, H-1.
Defendant's Exhibit I-1, I-2.
Defendant's Exhibit J.
Defendant's Exhibit N.
Defendant's Exhibit O.
Defendant's Exhibit P.
Defendant's Exhibit Q.
10. This Designation.
Dated this 18th day of May, 1956.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Defendant-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 22, 1956. Paul P. O'Brien,
Clerk.

No. 15132

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MUENCH-KREUZER CANDLE CO., INC., a corporation,

Appellant,

vs.

LESTER F. WILSON,

Appellee.

OPENING BRIEF FOR APPELLANT.

LYON & LYON,

CHARLES G. LYON,

811 West Seventh Street,
Los Angeles 17, California,

Attorneys for Appellant.

FILED

NOV 17 1950

PAUL F. OVERMAN, CLERK

TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the Case.....	2
Patent in Suit.....	2
Specification of Errors Relied Upon.....	4
Argument.....	8
The Wilson Patent in Suit.....	8
Noninfringement Since September 5, 1952.....	10
Invalidity of the Wilson Patent in Suit.....	12
Misrepresentation to the Patent Office.....	18
The Victrylite Candle Company Is a Necessary or Indispensable Party to This Litigation.....	20
Conclusion	22

TABLE OF AUTHORITIES CITED

CASES	PAGE
Berkeley Pump Co. v. Jacuzzi Bros., Inc., 214 F. 2d 785 (C.A. 9)	17
Blackmore v. Ford Motor Co., 56 F.2d 806 (C.A. 6).....	14
D & H Electric Co. v. M. Stephens Mfg., Inc., 108 U.S.P.Q. 27	11
Dunbar v. Meyers, 94 U.S. 187, 24 L.ed. 34.....	14
Great Atlantic & Pacific Co. v. Supermarket, 340 U.S. 147, 95 L.ed. 162	16
Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 88 L.ed. 1250.....	20
Hunter Douglas Corp. v. Lando, 215 F.2d 372 (C.A. 9).....	18
Independent Wireless Telegraph Co. v. Radio Corporation of America, 269 U.S. 459, 70 L. ed. 357.....	20
Kwikset Locks, Inc. v. Hillgren, 210 F.2d 483 (C.A. 9).....	17
Mas v. Coca-Cola Co., 163 F.2d 505 (C.A. 4).....	20
Millner v. Voss, 48 Fed. 832.....	15
Nachod & United States Signal Co. v. Automatic Signal Corp., 105 F.2d 981.....	21
Nestle-Le Mur Co. v. Eugene, Limited, 55 F.2d 854 (C.A. 6)....	14
Paper Container Manufacturing Co. v. Dixie Cup Co., 170 F.2d 333	21
Parker Rust-Proof Co. v. Western Union Telegraph Co., 105 F.2d 976	21
Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 89 L.ed. 1381.....	20
Shields et al. v. Barrow, 58 U.S. 130, 15 L.ed. 158.....	21
Slawson v. Grand Street Railway, 107 U.S. 649, 27 L.ed. 576....	14
T.W. & C.B. Sheridan Co. v. W. F. Hall Printing Co., 104 F.2d 603 (C.A. 7).....	15
Waterman v. Mackenzie, 138 U.S. 252, 34 L.ed. 923.....	21

No. 15132
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MUENCH-KREUZER CANDLE Co., INC., a corporation,
Appellant,

vs.

LESTER F. WILSON,
Appellee.

OPENING BRIEF FOR APPELLANT.

This is an appeal from a judgment entered April 16, 1956 by the District Court for the Southern District of California, Central Division, adjudging valid and infringed Wilson Patent No. 2,464,361 with respect to all the claims of said patent.

Jurisdiction.

Jurisdiction to review the judgment herein is conferred by Section 1292(4) of Title 28, U. S. C. The judgment was entered April 16, 1956. Notice of appeal was given April 19, 1956 [R. 20],* within the thirty-day period provided for in Rule 73 of the Rules of Civil

*Reference to the printed record will be designated by "R." and the page number of the printed record.

Procedure. Jurisdiction over the subject matter is conferred by Title 28, Section 1338, U. S. C., and jurisdiction over the defendant by Section 1400(b), Title 28.

Statement of the Case.

This is an action for infringement of Wilson Patent No. 2,464,361. The action is brought in the name of the patentee, Lester F. Wilson, who is the owner of the patent. Victrylite Candle Company is a licensee under the patent in suit under a license, Plaintiff's Exhibit 5 [R. 331], denominated "otherwise exclusive" in a limited field. Victrylite Candle Company has not joined in this action and while not an issue framed by the pleadings both at the pre-trial and trial, the issue of a want of a necessary party-plaintiff based upon the absence in this litigation of Victrylite Candle Company was raised and tried by the Court.

Patent in Suit.

The patent in suit relates to a candle having different colored aniline dyes impregnated at spaced intervals in the wick of the candle so that upon burning, the candle wax drippings will change color as the different dyes in the wick are dissolved in the molten wax of the drippings.

Prior to September 5, 1952, the defendant manufactured and sold a candle with different colored aniline dyes impregnated in the wick of the candle at spaced intervals. Infringement of the claims of the patent in suit, if valid, by this candle, is not contested. Subsequent to September 5, 1952, the defendant manufactured a candle as exempli-

fied by Defendant's Exhibit N. In the manufacture of this candle, a wick is dipped in candle wax to form a core or thin taper of about a quarter of an inch thickness. On that core is painted successive strips of variously colored wax. This colored wax, mother color or muetter farben, is melted wax containing an aniline dye. Thereafter, the candle is again dipped successively until the desired diameter of the candle is built up. The plaintiff does not claim and the Court did not find infringement of Claims 2 through 6 of the patent in suit by the candle as manufactured by defendant since September 5, 1952, as each of these claims is specifically limited to having the coloring material in the wick. The District Court did find infringement by this later candle of Claim 1.

The issues framed by the pleadings and tried by the Court are the validity of Claims 1 through 6, the infringement of Claim 1 since September 5, 1952 and whether or not this case can be maintained in the absence of the Victrylite Candle Company. With respect to the issue of infringement of Claim 1, defendant relies upon the plain wording of the claim which calls for the dye in the candle to be normally undissolved in the wax of the body of the candle which defendant contends is not met by a candle such as Exhibit N in which wax is first dissolved in dye and then painted on a quarter inch taper. This contention of defendant's, defendant will contend, is reinforced by the file wrapper of the Wilson Patent in which claims of the scope sought by the plaintiff and given by the District Court were rejected by the Patent Office and

cancelled by the patentee thus estopping the plaintiff from seeking an interpretation of Claim 1 sufficient to find infringement. With respect to validity, defendant will contend that the claims of the patent in suit are invalid as embodying no invention over the prior art and as having been obtained by a misrepresentation to the Patent Office as to certain prior art patents:

Specification of Errors Relied Upon.

Appellant relies upon the errors specified in its statement of points upon appeal filed May 18, 1956 [R. 320-324] reading as follows:

“I.

“The District Court erred in concluding that Claims 1 to 6 and each of them of the patent in suit No. 2,464,361 are good and valid in law.

“II.

“The District Court erred in failing to find that Patent No. 2,464,361 and each of the claims thereof are invalid and void for want of invention over the prior art.

“III.

“The District Court erred in failing to find that Patent No. 2,464,361 and each of the claims thereof are invalid and void and unenforceable for having been procured by a fraud perpetrated upon the United States Patent Office by reason of a false representation made in plaintiff's brief on Appeal to the Patent Office Board of Appeals that ‘The metallic salts and the like employed for flame coloring in the references

are not dyes, they are not wax soluble, and they would not affect the color of drippings if the candles were of the drip producing type.'

"IV.

"The District Court erred in concluding that candles manufactured by defendant-appellants since September 5, 1952, infringe Claim 1 of Patent No. 2,464,361.

"V.

"The District Court erred in concluding that 'Examination of the file history of the Wilson patent application reveals no estoppel against plaintiff's assertion of validity and infringement.'

"VI.

"The District Court erred in failing to conclude that Claim 1 of Patent No. 2,464,361 is limited to a candle in which the dyes are 'normally undissolved in the wax of said body' and hence not infringed by candles as manufactured by defendant-appellant since September 5, 1952, in which the dyes, prior to application to the taper, are first dissolved in wax.

"VII.

"The District Court erred in concluding that the prior art relied upon by defendant does not support defendant's contentions of invalidity in view of the rules and laws as laid down in *J. A. Mohr & Sons vs. Alliance Securities Co.*; *Standard Oil Company vs. Same* (Ninth Circuit Court of Appeals 1926), 14 F. 2d 799; *Flakice Corporation v. Liquid Freeze Corp.*, 130 F. Supp. 471 (D. C. N. D. Cal., 1955);

Dewey & Almy Chemical Company, *et al.* vs. Mimex Company, Inc. (Second Circuit Court of Appeals)
124 F. (2d) 986.

“VIII.

“The District Court erred in concluding that Victrylite Candle Company is neither a necessary nor indispensable party in this Action.

“IX.

“The District Court erred in concluding that plaintiff is entitled to an injunction and an accounting for profits and damages by reason of defendant’s infringement.

“X.

“The District Court erred in failing to find that all candles drip.

“XI.

“The District Court erred in refusing to find, as requested by defendant, that certain of the metallic salts listed in the Fredericks Patent No. 2,184,666, when placed in sufficient quantities on the wick of a candle which drips, will color the drippings of said candle, specifically including copper acetate, cupric chloride, copper hydroxide and ferric oxide.

“XII.

“The District Court erred in failing to find, as requested by defendant, that the use of analine dyes, both in the wick and as a dye to color the core of a candle a different color than the main body of a candle was old in art prior to the time when plaintiff made the invention embodied in the patent in suit.

“XIII.

“The District Court erred in finding that none of the prior patents or publications relied upon by defendant refers to a drip candle, or reveals any contemplation of making a candle which characteristically is of a wax dripping type.

“XIV.

“The District Court erred in failing to find that since 1941 defendant has manufactured and sold, and advertised in its catalog its Star-Pillar candles in which wax colored differently than the exterior of the candle drips upon burning.

“XV.

“The District Court erred in failing to find the German Patent 157,209 of December 28, 1904 discloses a candle which upon burning drips a wax over the exterior of the candle colored differently than said exterior.

“XVI.

“The District Court erred in failing to find that Great Britain Patent 95 of 1871 discloses a candle which upon burning drips a wax over the exterior of the candle colored differently than said exterior.

“XVII.

“The District Court erred in failing to conclude that the patent in suit discloses a mere multiplication of defendant's Star-Pillar candle, or of said candle of said German patent No. 157,209 or of said British Patent No. 95 of 1871 and hence no invention over the prior art.”

ARGUMENT.

The Wilson Patent in Suit.

The patent in suit discloses an extremely simple device consisting simply of a candle having a wick 11 embodied in a wax body 10. The wick 11 has spaced segments 13 impregnated with wax soluble dyes of different colors. Upon burning the wax of the drippings is colored successively to the color of the dye in the portion of the wick being burned.

The Wilson Patent had a very stormy trip through the Patent Office. All of the original claims were rejected on the basis of the Funke and Nelson Patents [R. 346, 348] and were cancelled by the applicant [see Pltf. Ex. 2, file wrapper of the patent in suit]. Thereafter the applicant submitted new application Claims 15 through 23 [see the amendment dated March 11, 1946, p. 13 of Ex. 2]. These claims were rejected and Claims 15 through 18 were rejected as being too broad. Claims 19 through 23 eventually became Claims 2 to 6 of the patent. Claim 18 as originally presented read as follows:

“18. A drip candle comprising a wax-like body, different wax-soluble dyes normally concealed within the interior of the body at different locations longitudinally thereof, said dyes dissolving in the melted wax of the body to form multi-colored drippings as the candle progressively burns.”

Concerning this claim, the Patent Office Examiner stated:

“Claim 15 is further rejected with claims 16, 17 and 18 as incomplete and obviously too broad. The wick is an essential part, yet it is not introduced. These claims are broad enough to read on candles

consisting of layers of wax of different colors, for example, a candle having a red core and a green jacket thereabout."

In response to this rejection, the applicant inserted in Claims 18 (which then after further proceedings became Claim 1) the limitation that the wax soluble dyes were "normally undissolved in the wax of said body."

Nevertheless the claims were again and this time finally rejected as unpatentable over Funke or Nelson and the applicant appealed. It is noted that Funke and Nelson both propose the addition of certain metallic salts to the wick of a candle, the purpose being to produce a candle which upon burning presents different colored flames.

Applicant's attorney filed a brief before the Board of Appeals in which he categorically stated: "The metallic salts and the like employed for flame coloring in the references are not dyes, they are not wax soluble, and they could not affect the color of drippings even if the candles were of the drip producing type." There can be no doubt on this record that some metallic salts will color the drippings of a candle. Thus, the Board of Appeals was misled by the applicant's brief as to what was necessarily disclosed by the prior art. This was done and the representation made to the Patent Office that no metallic salts would color the drippings of a candle despite the fact that the applicant had made no experiments to determine whether or not any of the recited metallic salts would in fact color the drippings of a candle and did not in fact know whether they would [R. 79-80].

Noninfringement Since September 5, 1952.

As stated above, since September 5, 1952, all of defendant's accused candles have been manufactured in accordance with Exhibit N in which no dye is applied to the wick of the candle but in which different aniline dyes dissolved in wax are applied to a quarter inch thick taper. The defendant thus avoids the language of Claims 2 through 6 which call for the dye to be applied to the wick, and plaintiff does not even contend nor did the Court find that these claims are infringed by the candles as manufactured by defendant since September 5, 1952. The defendant contends that these candles do not infringe Claim 1 for the same reason. It is inconceivable to us how a candle, when manufactured by dissolving dye in molten wax and then painting the resultant mother color or molten wax containing the dissolved dye on the body of a taper, can be found to fulfill the limitation of Claim 1 that the dye is normally undissolved in the wax of said body. The fact that dye in the defendant's candles is dissolved in the body of the candle is vividly illustrated by Exhibit Q. This is a candle manufactured by the defendant at least as early as 1953 [R. 65], and it is apparent from examination of this candle that the dye has migrated to the extent that it is visible from the exterior of the candle. This is known in the art as "bleeding" and demonstrates that the dye is in fact in solution in the body of the candle [R. 136, 227].

The District Court misconstrued the language of Claim 1 in making its decision. The District Court stated [R. 311] that to its mind the phrase "normally undissolved in the wax of said body" means that it is undissolved so that even on closest inspection you cannot tell there are any colorings in the candle which will drip, but this

was the plain meaning and scope of Claim 18 of the file wrapper which became Claim 1 prior to the amendment which inserted the very language in question. The concept of having the dye concealed so that even on closest inspection it cannot be seen is covered by a totally different phrase of the claim, *i.e.*, that appearing in lines 2 and 3 wherein the dye is stated to be “normally concealed within the interior of the body.” The Examiner pointed out that a claim of the scope of Claim 18, disregarding the amendment of August 5, 1947, would read on candles consisting of layers of wax; for instance, “a candle having a red core and a green jacket thereabout.” The District Court would clearly grant Claim 1 a scope that would read on such a candle, but clearly the Patent Office did not intend to allow any such claim. We will point out hereinafter that candles having a core colored differently from the exterior of the candle were beyond question old in the art long prior to any date attributable to Wilson. What the District Court did, therefore, was to grant to Claim 1 the same scope as the rejected Claim 18 prior to its amendment. In this the Court erred for it is fundamental in patent law that when a claim has been rejected by the Patent Office and it is amended by the insertion of a further limitation, the patentee is estopped to seek for an interpretation of the claim of the same scope as the claim would have had had it not been so amended.

This Court had occasion to apply this doctrine in the recent case of *D & H Electric Co. v. M. Stephens Mfg., Inc.*, 108 U. S. P. Q. 27, wherein the rule was stated as follows:

“Having asserted the novelty of the right angle principle in order to secure the patent, appellant

cannot now expand his coverage to include other claims which were denied him in the proceedings before the Patent Office. This is simply the exercise of the doctrine of 'file wrapper estoppel'—the gravamen of which is that an applicant who acquiesces in the rejection of his claim, and accordingly modifies it to secure its allowance, will not subsequently be allowed to expand his claim by interpretation to include the principles originally rejected or their equivalents."

Accordingly, under the plain language of Claim 1, reinforced by the doctrine of file wrapper estoppel, the candle as manufactured by the defendant since September 5, 1952 must be noninfringing and the judgment of the District Court to the contrary must be reversed.

Invalidity of the Wilson Patent in Suit.

There can be no question but that there existed, prior to any invention by Wilson, candles in the prior art in which a dye was impregnated in the core of the candle or in the wick and the candle thereafter finished by building up the body with wax of a different color; nor can there be any question of the fact that such candles were intentionally drip candles. The defendant itself had for many years manufactured its Star-Pillar candle which was a drip candle having a colored core and a white exterior, the core intentionally dripping over the exterior. Such a candle is in evidence as Defendant's Exhibit F, which candle is identified in defendant's 1940 catalog, Defendant's Exhibit C, as a candle which drips red over a white exterior.

If the drip candle of Exhibit F were to be produced with a core that is red half way down and green the

rest of the way, under the lower court's decision, it would be held an infringement. Yet it would be but an aggregation of a red core section and a green core section. It is obvious that such a candle would drip red and then green, in the same manner that Exhibit F drips red during the entire burning period. Candles of the type of Exhibit F were in the Examiner's mind when he held that Claim 18 would read on a candle having a red core and a green jacket thereabout.

The patent to Housamann, Defendant's Exhibit A-11, the German Patent No. 157,209, discloses a candle having a colored core and a different colored exterior. An example of this candle is in evidence as Defendant's Exhibit H [R. 131-132]. A stipulated translation of this patent is in evidence as Defendant's Exhibit B [R. 394], and it is noted that the patentee proposed that "the coloring of the core material is done by means of fat soluble aniline colors and that the material of the candle body surrounding the core may be white or any other color differing from that of the core."

The British Patent to Sterry No. 95, Defendant's Exhibit A-7 [R. 359], discloses a candle having a blue, violet or pink dye on the wick and a pearly white body. The wick of this candle is not colored completely to the ends, but the ends of the wick are left white. Thus, it is impossible for one to tell from inspection of this candle that the wick has been dyed. It is noted that this patentee also proposed to use aniline colors. A sample of a candle prepared in accordance with the teachings of the Sterry British Patent is in evidence as Defendant's Exhibit G-2 [R. 188], and it is noted that it dripped upon burning a different color than the exterior of the candle. Thus, we have in the prior art candles in which the wick may

be dyed various colors and candles in the prior art in which the core of the candle may be dyed various colors differing from the outer coating of the candle. These candles upon burning drip drippings colored differently from the body of the candle.

Mr. Wilson has merely taken any one of these three prior art patents and duplicated or multiplied the differently dyed wick or core of the prior art. Each section of dyed wick in the Wilson Patent functions exactly like the dyed wick of the Sterry British Patent or the colored cores of defendant's Star-Pillar candle or the Housamann Patent in that it drips over the body of the candle a dripping colored differently from that body. It is well established patent law that mere multiplication or duplication of elements present in the prior art is not invention. This has been the settled law of the United States since the early case of *Dunbar v. Meyers*, 94 U. S. 187, 24 L. Ed. 34, wherein a patent proposing the use of two deflecting plates, one placed on each side of a circular saw, was void as not constituting a patentable invention when the use of one such deflecting plate was old in the art.

In *Nestle-Le Mur Co. v. Eugene, Limited*, 55 F. 2d 854 (C. A. 6), a patent was held void for want of invention on precisely this ground, the Court stating: "It also represents but a duplication of operative parts, which likewise is not invention."

In *Blackmore v. Ford Motor Co.*, 56 F. 2d 806 (C. A. 6), the patent in suit was held invalid on this same ground wherein the patent disclosed two sockets in place of the prior art single socket.

In *Slawson v. Grand Street Railway*, 107 U. S. 649, 27 L. Ed. 576, the Court held invalid on this exact ground

a patent embodying a mere duplication of the number of panes of glass in a streetcar fare box.

In *Millner v. Voss*, 48 Fed. 832, the Court held invalid a patent for a second curing fire-place in a tobacco curer.

Finally, in *T. W. & C. B. Sheridan Co. v. W. F. Hall Printing Co.*, 104 F. 2d 603 (C. A. 7), the Court held that the mere duplication by the patentee of the number of stitchers involved merely mechanical skill and not invention.

Certainly, once given the suggestion of duplicating any of the prior candles of Housamann, Sterry or the Star-Pillar candle, there was no problem for the patentee, Wilson, to solve as to how to do it. It is stipulated in this case, Defendant's Exhibit B [R. 393], that the use of aniline dyes to color candles was old long prior to the patentee's invention. It will be shown hereinafter that numerous patentees had proposed candles in which the color of the flame would change as the candle burned. Thus, the element of surprise was not a new idea, and the element of change of color with respect to candles was not a new idea. There was no problem to be solved and the decree of the District Court must be reversed and the Wilson Patent held invalid for want of invention.

Apart from the verbiage of the Wilson Patent claims, Wilson's idea of his alleged invention [to use his words in the Victrylite license, R. 18] is:

"candles having dyed cores * * * comprising at different points axially of the candle at least two different colors."

The question on validity boils down to whether applying different colors to the candle core in the face of prior use of cores of a single color amounts to invention.

In the *Supermarket** case, the Supreme Court said:

“The mere aggregation of a number of old parts or elements which in the aggregation perform or produce no new or different function or operation than that theretofore performed or produced by them is not patentable invention. * * * The conjunction or concert of known elements must contribute something; only when the whole exceeds the sum of the parts is the accumulation of old devices patentable. * * * This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned and there is nothing to indicate that the lower courts scrutinized the claims in the light of this rather severe test.

“Neither court below has made any finding that old elements which made up this device perform any additional or different function in the combination than they perform out of it * * * two and two have been added together, and still they make only four.

“The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as presented here, obviously withdraws what is already known, into the field of monopoly and diminishes the resources available to skillful men. * * * To bring these devices together and apply them to save the time of a customer, *was a good idea*, but scores of progressive ideas in business are not patentable, and we conclude this one was not.”

**Great Atlantic & Pacific Co. v. Supermarket*, 340 U. S. 147, 95 L. Ed. 162.

The foregoing demonstrates the correctness of defendant's position as stated in Assignment of Error No. XVII reading as follows:

"The District Court erred in failing to conclude that the patent in suit discloses a mere multiplication of defendant's Star-Pillar candle, or of said candle of said German patent No. 157,209 or of said British Patent No. 95 of 1871 and hence no invention over the prior art";

and demonstrates the error in Finding of Fact No. 14 wherein the Court held that none of the prior art teaches a multicolor drip candle which upon burning will produce successively different colored drippings, as obviously the prior art does teach the dripping of candle wax differently colored from the exterior of the candle, and it takes no further teaching to know that two colors in the core stacked will drip two colors in succession. This Court has applied the applicable rules of law in reversing the Southern District of California in *Kwikset Locks, Inc. v. Hillgren*, 210 F. 2d 483 (C. A. 9), wherein the Court said:

"There is no invention of a 'mere aggregation of a number of old parts or elements' nor in the accumulation of old devices which do not in some way exceed 'the sum of its parts.' Moreover, a truly inventive combination must create what had not before existed, or bring to light what lay hidden from vision in a way which can be distinguished from 'simple mechanical skill.' "

The rule announced in *Berkeley Pump Co. v. Jacuzzi Bros., Inc.*, 214 F. 2d 785 (C. A. 9), is also applicable:

"* * * where a mechanical combination device represents only an integration of various old elements and the combination clearly reveals that its old ele-

ments thus brought into conjunction or concert do not *functionally operate differently therein* than they did before integration, then it is not a patentable invention.”

See also:

Hunter Douglas Corp. v. Lando, 215 F. 2d 372,
(C. A. 9).

In conclusion, upon the issue of validity it is submitted that the Wilson Patent embodies merely a duplication of elements old in the art, which elements are merely aggregated and perform functionally exactly in the manner in which they performed in the prior art, and, therefore, the patent and each of the claims thereof are void for want of invention.

Misrepresentation to the Patent Office.

As pointed out above, after the Patent Office finally rejected Mr. Wilson's application for patent, an appeal was taken to the Patent Office Board of Appeals in which applicant's attorney filed a brief wherein the following positive assertion was made to the Board of Appeals: "The metallic salts and the like employed for flame coloring in the references are not dyes, they are not wax soluble, and they could not affect the color of drippings even if the candles were of the drip producing type." This assertion is contrary to fact. At the trial, defendant demonstrated that various metallic salts when incorporated in the wick of a candle would color the drippings and in fact the plaintiff has stipulated as follows: "* * * it was known in the candle making art prior to the invention of Wilson of the invention covered by United States Letters Patent No. 2,464,361, that metallic salts and aniline

dyes were useful in the coloring of candles * * *”
[R. 393], Defendant’s Exhibit B.

It is noted that the flat denial in plaintiff’s brief, quoted above, does not assert that some metallic salts or even most metallic salts will not color the drippings of a candle. but in effect the statement is that none of the metallic salts would affect the color of the drippings of a candle. There is in evidence a candle made in accordance with the teachings of Fredericks Patent No. 2,184,666 [R. 351] employing copper salts, *i. e.*, copper acetate and copper chloride, materials specifically listed on page 2, second column, lines 63 through 74. of the Fredericks Patent [R. 352]. This candle, Defendant’s Exhibit E-3, was burned partially during the trial, and this Court of Appeals can examine the same and see that upon burning, the candle dripped green drippings over the white exterior of the candle. The Court noted this green dripping during the trial [R. 237]. The same is apparent from Defendant’s Exhibits D and D-2, being a candle manufactured in part from copper acetate and in part from copper chloride and intended by the witness Muench to represent Nelson Patent No. 1,908,044 [R. 348] which specifically mentions copper. In fact we do not believe that upon this record the appellee will seriously contest the fact that some metallic salts, specifically including copper acetate, cupric chloride, copper hydroxide and ferric oxide, will color the drippings of a candle and that at least copper acetate has been used for the coloring of a candle for many many years [R. 119]. It is at once apparent, therefore, that the Wilson Patent was ordered granted by the Board of Appeals of the Patent Office, based upon the direct misrepresentation of fact, which representation, it is even now stipulated, is untrue.

In *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238, 88 L. Ed. 1250, the Supreme Court of the United States ruled invalid a patent as having been procured by fraud upon the Patent Office where, to induce the granting of the patent, the attorneys for the patentee wrote an article for publication and paid the president of a union a bribe for signing his name to the article thus misrepresenting the authorship of the article. However, no contention was made at any time that any of the facts stated in the article were untrue. Here we have a stronger case, a direct misstatement of fact. Under these circumstances, this Court should not hesitate to strike down the patent. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U. S. 806, 89 L. Ed. 1381; *Mas v. Coca Cola Co.*, 163 F. 2d 505 (C. A. 4).

The Vicrylite Candle Company is a Necessary or Indispensable Party to This Litigation.

As is shown by plaintiff's Exhibit 5 [R. 331], the plaintiff has granted a license to the Vicrylite Candle Company covering the field of candles having dyed cores as distinguished from dyed wicks. If, contrary to defendant's position herein but in accordance with the lower Court's decision, the patent in suit covers dyed cores, then this license to the Vicrylite Candle Company covers the very monopoly which is in question in this case, and this license, except for a personal, single and indivisible right reserved in the plaintiff, is "otherwise exclusive." We can start from the premise that it is well-settled that the exclusive licensee under a patent is a necessary party in a suit against an alleged infringer. *Independent Wireless Telegraph Co. v. Radio Corporation of America*, 269 U. S. 459, 70 L. Ed. 357, and this is true even though

the original holder of the patent after making an assignment (in equity an exclusive license is an assignment, *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. Ed. 923), reserves to himself a nonexclusive royalty-free license to make, use and sell the invention, *Paper Container Manufacturing Co. v. Dixie Cup Co.*, 170 F. 2d 333. It is noted that in the case just cited, both the assignor and assignee were held to be indispensable parties. For further cases considering the question of indispensable parties in patent litigation, see *Parker Rust-Proof Co. v. Western Union Telegraph Co.*, 105 F. 2d 976, and *Nachod & United States Signal Co. v. Automatic Signal Corp.*, 105 F. 2d 981.

The oft cited case of *Shields et al. v. Barrow*, 58 U. S. 130, 15 L. Ed. 158, defines an indispensable party as "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The principal issues before this Court in this case are the question of whether the patent in suit extends to and monopolizes candles having variously colored "cores" (this is the very subject matter "otherwise" exclusively licensed to Victrylite Candle Company). If this Court determines that the Wilson Patent does not extend to, i. e. is not infringed by, candles having the dye dissolved in wax and painted on a core, as is defendant's practice, or if this Court holds Claim 1 of the patent in suit invalid, this Court will adjudicate the very right purportedly exclusively granted to Victrylite Candle Com-

pany. Certainly, the Victrylite Candle Company is intimately concerned in any such adjudication.

We submit, therefore, that this is a case in which Victrylite Candle Company has an interest of such a nature that the decree of this Court must necessarily affect it. Under such circumstances, it seems apparent that the Victrylite Candle Company is a necessary or indispensable party to this litigation.

Conclusion.

In conclusion, defendant submits that the judgment of the District Court should be reversed and this cause dismissed for the reasons that:

(1) The Wilson Patent in suit is invalid for want of invention over the prior art as constituting mere duplication or multiplication of elements old in the art and having been procured by a direct misrepresentation of fact to the Patent Office;

(2) That Claim 1 of the patent in suit is not infringed by the candles manufactured by defendant since September 2, 1952 for the reason that defendant's candles do not have their dyes "normally undissolved in the wax of the body;" and, finally

(3) That this litigation cannot be carried on in the absence of Victrylite Candle Company.

Respectfully submitted,

LYON & LYON,

CHARLES G. LYON,

Attorneys for Appellant.

No. 15132

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MUENCH-KREUZER CANDLE CO., INC., a corporation,
Appellant,

vs.

LESTER F. WILSON,
Appellee.

APPELLEE'S BRIEF.

H. CALVIN WHITE,
611 Wilshire Boulevard,
Los Angeles 17, California,
Attorney for Appellee.

FILED

DEC 11 1956

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
The Wilson patent.....	2
Flame coloring versus wax coloring.....	5
The findings and conclusions of law.....	6
Finding 5	6
Finding 8	7
Finding 12	8
Finding 13	8
Finding 14	9
Finding 15	9
Finding 9	18
Finding 10	18
Finding 16	21
Finding 11	21
Finding 17	24
Finding 18	24
Finding 19	26
Finding 20	27
Appellant's specification of errors.....	28
Indispensability of Vicrylite Candle Company in this action.....	35
Applicable cases re asserted invalidity of the Wilson patent.....	39
Conclusion	42

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bakelite Corp. v. Lubri-Zol Development Corp., 34 F. Supp. 142 (DC D. Del., 1940).....	37
Bowers v. Atlantic, Gulf and Pacific Co., 162 F. 895 (CCSD W. Va., 1907).....	37
Comptograph. Co v. Universal Accountant Machine Corp., 142 Fed. 539	37
Dewey & Almy Chemical Company et al. v. Mimex Company, Inc. (C. C. A. 2), 124 F. 2d 986.....	39
Flakice Corporation v. Liquid Freeze Corp., 130 F. Supp. 471....	41
Frankfort Whiskey Process Co. v. Pepper, 26 Fed. 336 (CC SDNY, 1885)	37
J. A. Mohr and Sons v. Alliance Securities Co., Standard Oil Company v. Same (C. C. A. 9, 1926), 14 F. 2d 799.....	40
Min-A-Max Co., Inc. v. Sundholm, 24 F. Supp. 89 38 USPQ 220 (DCND Iowa, 1938).....	37
Nellis v. Pennack Mfg. Co., 13 Fed. 451 CC ED Penn., 1882)..	38
Waterman v. MacKenzie, 138 U. S. 252, 34 L. Ed. 923.....	38
Zenith Radio Corp. v. RCA, 121 F. Supp. 803 (DC Del., 1954)	36

No. 15132
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MUENCH-KREUZER CANDLE Co., INC., a corporation,
Appellant,
vs.

LESTER F. WILSON,
Appellee.

APPELLEE'S BRIEF.

This action was brought by Lester F. Wilson the inventor and undisputed owner of patent 2,464,361, against Muench-Kreuzer Candle Co., a New York corporation, for infringement of the patent. Appellant-Defendant alleged invalidity of the patent, admitted infringement by certain of its earlier candles, denied infringement by certain of its later candles, and "reserved" for consideration of the Court the alleged absence of a necessary or indispensable party.

The District Court afforded both parties full and complete hearing on the evidence and arguments, and as the record will show, observed and examined with such thoroughness the various exhibits presented by appellant, that there can be no question concerning Judge Hall's complete familiarity with the facts and his ability

to evaluate their significance in this action. Exhibits were produced and testimony given by appellant's sole witness Norbert C. H. Muench, Vice-President of appellant, and by appellee Lester F. Wilson and Ira C. Bechtold, chemist and chemical engineer.

The Wilson Patent.

The Wilson invention will be readily understood from the patent itself [R. 328-330].* Though simple, the invention represents originality and ingenuity of a high order, a fact not only self-evident from seeing the candle itself, but apparent also by comparison with all the evidence developed and presented in this suit.

Application for the Wilson patent was filed March 13, 1945 on an invention distinctly characterized by certain novel structural and performance features which appellant has been completely unable to find in the prior art, and which should be kept in mind in appraising the merits of its appeal.

1. A candle purposely made to drip profusely;
2. Having *concealed* within its interior a *longitudinal succession of different wax coloring materials* or dyes initially undissolved in the wax bulk or body of the candle, so that;
3. Upon burning of the candle the dyes will dissolve or disperse in the body wax and color the drippings successively *different and unpredictable colors*; and
4. Out of a *single* candle will be produced a decorative accumulation of variegated drippings.

*Like references are made throughout this brief to page numbers of the printed "Transcript of Record."

In the Patent Office prosecution of the Wilson application, the Examiner erroneously rejected the claims on prior patents the same or similar to many of the publications relied upon by defendant. The Board of Appeals reversed the Examiner in holding:

“We do not find, however, any suggestion in the prior art of the treatment of candles in any way which would produce a result disclosed by applicant. In view of the conclusion that the subject matter is useful and of sufficient importance and that the claims define a structure which is not anticipated by the prior art, it should be regarded as involving the element of invention, notwithstanding the simplicity of the inventive thought when once arrived at and what appellant has done. Judged by any standards announced by the courts it is entitled to patent protection.”

Thus did the Board of Appeals, acting pursuant to the Constitutional intent that the useful arts and sciences shall be encouraged by patent grants, sanction the issuance of the Wilson patent. That the public has benefited by the invention is shown by Wilson's sales of his candles [Pltf. Ex. 4] starting in 1945 and as compiled through 1955 [Pltf. Ex. 15; R. 56, 338]. Included in the public that has benefited, or has sought to benefit from the invention, are certain admitted infringers, including appellant, who have failed completely to show any prior knowledge by them, or others, of the Wilson invention prior to issuance of the patent, but who for no apparent reason other than determination to override a small manufacturer, have taken the invention for their own gains.

Here is what happened in two instances related in the Record. The Wilson patent issued March 15, 1949.

As related by Mr. Wilson [R. 58-64], Victrylite Candle Company, of Wisconsin, commenced infringement of the patent. Wilson filed suit December 5, 1949 (Civil Action 4904) for infringement in the United States District Court for the Eastern District of Wisconsin, a certified copy of the complaint being Plaintiff's Exhibit 7. Victrylite Candle Company answered [Pltf. Ex. 8], pleading, it will be noted, about the same prior art relied upon by defendant herein. Consent decree [Pltf. Ex. 9] was entered against Victrylite Candle Company, after Victrylite requested and was granted certain license rights [Pltf. Ex. 5; R. 331], under which royalties have been paid according to Plaintiff's Exhibit 6 [R. 335]. Presently appellee has pending in the United States District Court for the Eastern District of Wisconsin, an action against the licensee Victrylite Candle Company, for non-payment of royalties under the aforesaid license agreement [R. 79].

The appellant after knowing of the Wilson patent as early as September 23, 1949 [R. 100], was notified of, and requested to discontinue its infringement by letter dated April 26, 1950 [R. 336]. As will later appear, appellant was then making and selling candles so specifically like the showing in the Wilson patent that it could not possibly deny infringement, and consequently has admitted infringing from May 17, 1949 to September 5, 1952 [R. 46-47]. Thereafter appellant continued making the same type of candle, changed only in a minor respect [Deft. Ex. N], which the District Court had no difficulty in finding avoided neither the spirit or scope of the Wilson patent.

Flame Coloring vs. Wax Coloring.

Our later discussion and understanding of the evidence, and particularly the physical exhibits, considered and demonstrated at the trial, can be clarified by first considering the nature and distinction between asserted candle flame coloring materials and wax coloring materials.

As the record will show, it is agreed that no relationship exists between the flame coloring properties of a metal, and the wax coloring properties of compounds of that metal. Note the following stipulation [R. 270]:

“Mr. White: That is right and since the defendant has asserted that it is following the teachings of Nelson and Fredericks, I want to prove with unmistakable clarity that what is said about the flame color producing properties of the metal is no teaching of what compounds of that metal will color a wax.

Mr. Lyon: I will stipulate to it.”

The testimony of Ira C. Bechtold [R. 258-273] proves the following:

1. Different metals when heated in *high temperature* flames will produce different characteristic colors.
2. In general, compounds (*e.g.* salts) of those metals have less color producing tendencies at corresponding temperatures.
3. The temperatures of candle flames *are not sufficiently high* to produce significant flame coloring, as represented by such patentees as Nelson and Fredericks, or to overcome the characteristic yellowish coloring of all wax candle flames.

4. Accordingly, those patents purporting to teach candle flame coloring are, in any realistic sense, unworkable and inoperative.
5. Therefore, it is inescapable that such patents as Nelson, Fredericks and Funke cannot be construed as any teaching of *wax coloring*, particularly as and for the purposes of the Wilson patent, because they say nothing about (a) making *drip* candles, or (b) of coloring the wax even if their candles would drip.
6. Plaintiff's Exhibits of the 18 series, prove the stipulated fact of no relationship between asserted flame coloring and wax coloring properties of metal compounds.

The Findings and Conclusions of Law.

Since appellant has the burden of showing wherein the Findings of the District Court are clearly erroneous, or wherein the Conclusions of Law, and the Judgment are unsupported by those Findings, the essence of the appeal can perhaps best be presented to this Court by reference to the evidence which not only supports, but renders inescapable the validity of the Findings, the Conclusions of Law, and Judgment. Appraisal of any merit in the "Statement of Points for Defendant-Appellant" [R. 320] can readily be made in the light of the evidence that supports the Findings.

Since there appears to be no issue concerning Findings 1 to 4, 6, 7 and 9, we will consider only those remaining.

Finding 5.

"All the claims, 1 to 6, of the Wilson patent are alleged to be infringed. Defendant answered, alleging as defenses, non-infringement, invalidity of the claims in the Wilson patent, and file wrapper estoppel. After answering, de-

fendant in its 'Defendants' Statement of Issues Involved' of record in this Action, stated:

"From May 17, 1949 to September 5, 1952, defendant manufactured candles with different aniline dyes impregnated in the wick. Infringement by this candle will not be contested."

"Since September 5, 1952 defendants' candles have not had dyes in the wick. Infringement by this candle is in issue."

"This issue involves: Scope of claims, File wrapper estoppel, Limitations imposed by prior art."

Remarks.

There appears to be no disagreement concerning this finding.

Finding 8.

At the trial defendant relied upon the following prior patents and publications.

UNITED STATES PATENTS.

Patent No. 1,596,017; inventor Harnisch; issue date August 17, 1926.

Patent No. 1,608,518; inventor Minrath; issue date November 30, 1926.

Patent No. 1,701,844; inventor Funke; issue date February 12, 1929.

Patent No. 1,908,044; inventor Nelson; issue date May 9, 1933.

Patent No. 2,184,666; inventor Fredericks; issue date December 26, 1939.

Patent No. 2,196,509; inventor Turner; issue date April 9, 1940.

FOREIGN PATENTS.

Patent No. 95; country Great Britain; inventor Sterry; issue date 1871.

Patent No. 3478; country Great Britain; inventor As-cough; issue date 1871.

Patent No. 122; country Great Britain; inventor Fields; issue date 1871.

Patent No. 5902; country Great Britain; inventor Smith; issue date 1897.

Patent No. 157,209; country Germany; issued date December 28, 1904.

(Note: Of these, Funke and Nelson were considered by the Patent Office in the prosecution of the Wilson application.)

Finding 12.

At the trial defendant produced, demonstrated by burning, and the Court observed candles allegedly made in accordance with the disclosures in the patents and publications listed above in Finding No. 8. Among these prior patents defendant made particular reliance upon the United States patents to Funke, Nelson and Fredericks, which had for their primary objectives the making of candles which upon burning would have their flames colored by materials such as metal salts contained within the candles, and particularly applied to the candle wicks.

Finding 13.

None of the prior patents or publications relied upon by defendant refers to a drip candle, or reveals any contemplation of making a candle which characteristically is of a wax dripping type.

Finding 14.

It follows therefore that none of the prior patents or publications relied upon by the defendant contains any teaching of a multi-color drip candle which upon burning will produce successively differently colored drippings in the manner taught by the Wilson patent.

Finding 15.

The defendant's candle exhibits allegedly following the teachings of Funke, Nelson and Fredericks were inoperative to produce coloring of their flames upon burning, as the patentees represented that the flames would be colored.

Remarks.

Considering collectively Findings 8, 12, 13, 14 and 15, we submit that the very minimum requirements that any prior art must have to represent any pertinency or legal sufficiency in appellant's behalf, are that the asserted art at least pertain to the manufacture of drip candles, and that any particular showing relied upon be workable or operative for its intended purposes. As to the merits of the defense in these respects, the cross-examination of Mr. Muench [R. 147-231] is revealing, and we submit conclusive to the proposition that appellant has been unable to show in any prior patent an intent to produce a drip candle, whether colored or uncolored, and that the unworkability of the principal patents relied upon by appellant at the trial, all were openly admitted.

Note the following excerpts from Mr. Muench's testimony:

"Q. (By Mr. White): I recall your statement as being that you followed the teachings of these prior art patents, is that right? A. To the best of my ability.

Q. Mr. Muench, can you point out to me in any one of those patents the expression 'drip candle'? A. It is not disclosed in either one.

Q. In any of them as a matter of fact? A. No, I didn't come across that in any of them." [R. 152.]

"Q. (By Mr. White): One of their essential and outstanding requirements is that they be drip candles, is that not right? A. Yes, that is the purpose of the candle.

Q. Without being drip candles they would not perform as they are intended to perform, is that not right? (160) A. That is right." [R. 153.]

"Q. So far as the candles we see here, as your exhibits made allegedly in accordance with the prior art patents, is it not true that for all purposes of flame coloring you would consider them commercially unsatisfactory? A. Yes, I would certainly not produce any colored flame candles with the salts as so far produced." [R. 149.]

"Q. (By Mr. White): No one else has succeeded to your knowledge in making a satisfactory colored flame candle using any such expedients, isn't that true? A. Yes, so far, commercially." [R. 149.]

Following not what was taught by the prior art, but instead what we submit appellant had learned about the Wilson candle (distribution of which throughout the United States had started in 1945)

[R. 55], appellant commenced the manufacture in 1949 of its "Make-A-Rainbow" candle, which was significantly different from the bulk of its standard line of candles in that it was purposely made (by the use of a smaller wick size) to drip profusely.

"A. A 9-ply is smaller than the wick that we use in the standard candle.

The Court: What do you use in the standard candle?

The Witness: That particular candle in the gold box, we use a 30-ply. But we also use 24-ply in certain types." [R. 156.]

At the trial, appellant apparently hoped to prove its defense principally by demonstrations of exhibits assertedly made in accordance with the Nelson and Fredericks patents. Perhaps the most remarkable thing about its attempted proofs was that appellant in its eagerness to color the candle drippings, ignored completely the intended flame coloring purposes of the patents, and in the course of its demonstrations, proved rather conclusively the unworkability of its own exhibits. Further, and as the record will show, for whatever these flame coloring patents may be worth, appellant was required to strain far beyond any apparent disclosures in the patents to produce colored drippings. Surprisingly, appellant had to admit that in its flame coloring candle exhibits, allegedly capable of wax coloring, the exhibits contained asserted coloring materials that were not even mentioned in the references. The following excerpts are revealing:

"Q. (By Mr. White): Mr. Muench, in your testimony concerning Defendants' Exhibit D pur-

portedly following the Nelson patent, I believe you stated that the candle is made using a 9-ply wick coated successively with copper acetate, iron salts, copper chloride and cadmium sulphide, am I correct? A. Yes, sir." [R. 158 and 159.]

"Q. Now, the second material, iron salts; what iron salts? A. Well, I suppose they all have different names. This one, if you want to pin this down to a certain angle, I can give it to you. I can't even pronounce it. It is spelled—this iron salt that we use from du Pont is spelled d-i-c-h-l-o-p-e-n-t-a-d-i-e-n-y-l-i-r-o-n." [R. 160.]

"Q. Do you find reference to that compound in the Nelson patent? A. No, I don't. Not by that name, anyway." [R. 161.]

"Q. (By Mr. White): The fourth compound used in Exhibit D is cadmium sulphide; do you find any reference in Nelson to cadmium sulphide? A. No, I don't." [R. 161.]

"Q. Do you mean that you prepared that exhibit purportedly in accordance with Nelson without knowing what color the compound or any part of it is supposed to color the flame according to Nelson? A. In some case, I would say yes, I wasn't particularly interested in coloring the flame in that particular sense. But the strontium that is mentioned here was supposed to color flames." [R. 164.]

"Q. D-1, Mr. Muench. That is a second candle purportedly made in accordance with Nelson. In that I believe you testified that you used orange red 621, and that is supposed to be cadmium sulphide selenide. Do you find any reference to such a compound in Nelson? A. No, I don't.

Q. Next you named copper acetate. Do you find copper acetate in Nelson? A. As I said before, no.

Q. Next you referred to Brown C-59, which is supposed to be a spinel of iron, chrome and magnesium. You find any reference in Nelson to any kind of a spinel? A. Here is selenium salts." [R. 165.]

"Q. So in this instance we find only one out of four compounds named in Nelson, namely copper chloride, that being a halide of copper, is that correct?" [R. 165.]

"So am I not correct in stating that in the preparation of Exhibit D-2 you used only one compound, one out of the four mentioned by Nelson? A. There is selenium used here and the orange red 621.

Q. Is cadmium sulphate selenide mentioned? A. No, not the combination." [R. 166.]

In their failure to follow any discernible teachings in Nelson, Defendant's Exhibits D, D-1 and D-2 are in the same category. Note particularly the fact that appellant avoided presenting to the Court, candles made according to the two examples in the Nelson patent [R. 168-170].

"Q. Now let us refer to your Exhibits E and E-2, purportedly made according to the Fredericks patent.

I believe you testified that Exhibit E contains in succession copper acetate, iron salts, copper chloride, cadmium sulphide.

What iron salts did you use? A. That is the one made by Du Pont with the long name.

Q. Did you find a reference to it in the Fredericks patent? A. Not by that long name, no, but I think he does mention iron salts, doesn't he?

Q. Aren't there a great many iron salts? A. Yes, there are.

Q. Did you try any other iron salts? A. Yes, we tried some other iron salts, that one that we used here in the spinel.

Q. But alone, did you try and find any other iron salts alone that would work satisfactorily in drip candles to color the wax? A. No, not salts as such. We tried a number of different salts originally, in fact, I even tried pieces of metal, rusted metal in there, which certainly colored the wax.

Q. Would you use them in the manufacture of a multi-colored drip candle? A. Not for commercial purposes." [R. 171.]

"Q. In the Fredericks patent do you find reference to cadmium sulphide, or any cadmium compound? A. No. There is copper and calcium mentioned, and serium." [R. 171.]

"Q. Fredericks refers to water soluble salts, doesn't he? A. I believe it does in certain cases.

Q. Are the iron salts that you use water soluble? A. Not to any extent." [R. 171 and 172.]

"Q. Continuing now on your Exhibit E-2, which I believe you testified was made to contain successively Orange Red 621, Blue No. 1, being a cobalt aluminate, (3) copper acetate, and (4) Brown C-59. Which of those four chemical compounds do you find mentioned in the Fredericks patent? Any of them? A. There is copper mentioned.

Q. Any cadmium sulfo-selenide? A. This blue has aluminum, and this calls it aluminate. This calls for aluminum.

Q. I understand Blue No. 1 to be cobalt aluminate. Do you find it in the Fredericks patent? A. Cobalt—I don't find cobalt mentioned, but I do find aluminum mentioned.

Q. Do you find any combination—will aluminum color the wax? A. No. But undoubtedly in combination with a cobalt it does.

Q. Therefore, cobalt aluminate means something different from aluminum, doesn't it? A. Well, it is a mixture, yes, but it still has aluminum in it, as I understand it.

Q. But you don't find anything in Fredericks that corresponds to cobalt aluminate, isn't that true? A. No, but does Fredericks just limit himself to . . .” [R. 172.]

As in the case of the Nelson patent, appellant avoided attempting to present any exhibits corresponding to the three specific examples in the Fredericks patent, and for good reason insofar as any success it would have had in producing colored drippings, as developed in the further testimony of Mr. Muench [R. 173-181]. Also exhibited were candles allegedly made in accordance with the British Field and Sterry patents, the German Hausamann patent, and a sample of appellant's Star Pillar candle, Exhibit P. How these can have any conceivable bearing on the Wilson patent in any factual or legalistic sense is difficult to perceive. As with all the publications, the British and German patents don't even mention drip candles, and none of them, including also appellant's Star Pillar candle, shows any intent or capacity to produce multi-color drippings.

“Q. Referring to your exhibits I, I-1 and I-2, the British Field patent, I believe you testified, Mr. Muench, that such a candle even if it were a drip candle could not burn in any manner productive of successively formed different colored drippings, is

that not right? A. That is right. They would have a tendency to blend along the length of the handle.

Q. And the British Field patent says nothing about making any drip candles, is that right? A. That is right.

Q. We are in agreement that your Exhibit O, the rope candle, is not a multicolored drip candle?

A. Which candle was that?

Q. Your rope candle. A. The 117 rope, no; that is a single core candle, single color.

Q. And the Star Pillar candle, Exhibit P, is not a multicolored drip candle?

Mr. Lyon: Do you mean Exhibit F?

Mr. White: Is it Exhibit F?

Mr. Lyon: Right.

Mr. White: I am sorry. Stand corrected on that.

The Witness: That is a single core, color candle." [R. 181 and 182.]

"Mr. White: In reference now to Defendant's Exhibit H, a candle purportedly made according to the German Hausamann patent, as I recall your testimony this is a candle made, using a 9-ply wick?

The Witness: Yes.

Q. (By Mr. White): Is there anything said in the Hausamann patent as to its being a drip candle? A. No.

Q. Are there any multiple coloring materials in the candle? A. No. One color at a time." [R. 182 and 183.]

Liberties certainly were taken in the making of Appellant's Exhibit G.

"Q. Now, I am particularly concerned about your direct testimony relating to Exhibit G, the Sterry

British patent. I believe you testified, Mr. Muench, that in the preparation of that exhibit you ironed into the wick successively aniline blue, aniline pink, and aniline violet dyes; am I correct? This patent says nothing about forming drippings, am I not right? A. No, it does not call for drippings." [R. 183.]

"Q. (By Mr. White): Now where in the Sterry patent, Mr. Muench, do you find any reference to coating the wick successively with blue, pink and violet aniline dyes? A. I combined the three in the one candle. It does not mention it in the patent that they use more than one color at a time, but it mentions the three of them as using any or all of them, I take it." [R. 186.]

"The Court: You had better ask him over again because he was talking about another Exhibit G.

The Witness: That one in Mr. Lyon's hand is with one color on the wick, blue.

Q. (By Mr. White): Would that not be more in keeping with the teachings of the patent than what I have in my hand? A. In that it only has one color, yes.

Mr. White: May we have that in evidence, please?

Mr. Lyon: That is agreeable.

The Court: We will call that G-2.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit G-2.)

Q. (By Mr. White): The one I hold in my hand does not correspond with any description in the Sterry patent, is that not right? A. If you are referring to the three colors . . .

Q. Right. A. That is right." [R. 187 and 188.]

Finding 9.

The Wilson patent relates to a novel drip candle, so characterized by its formation of wax drippings as the candle burns, which produces during burning and in an unpredictable sequence by reason of the concealment of different coloring materials in the candle, a succession of distinctly and differently colored drippings resulting from the melting of at least a portion of the candle body wax and its acquisition of successively different colors which said portion of the wax would not have before melting. The Court finds this candle to be unique in the candle making art.

Finding 10.

Defendant admits having had no knowledge of the manufacture or sale of any candle as defined in the preceding Finding 9 prior to the making of defendant's "Make-A-Rainbow" candle, or prior to March 13, 1945, the filing date of the application for the Wilson patent.

Remarks.

These findings are clearly supported by appellants' own answers to the following interrogatories [R. 81-83]:

"Question No. 1: Concerning the allegations in paragraph 8 of the Answer, state whether to defendant's knowledge a candle defined as follows:

"A drip candle having a wax body and containing within its interior different wax-soluable dyes at different locations longitudinally of the body, the different dyes being concealed with the candle body and being undissolved in any substantial portion of the body wax before the candle is burned, the dyes dissolved in the said portion of the body wax as the

candle burns with resultant formation of a composite of different colored drippings as the candle progressively burns.

"A. Had prior to March 13, 1945, been manufactured in the United States, other than by plaintiff, and if so, state:

- "1. The name and address of the manufacture;
- "2. The time of manufacture; and
- "3. The manufacturer's identification of all such candles.

"B. Had prior to March 13, 1945, been sold in the United States, other than by plaintiff, and if so, state:

- "1. The name and address of the seller;
- "2. The time of sale; and
- "3. The seller's identification of all such candles.

"Answer: A. No.

"Answer: B. No.

"Question Two:

"Concerning the allegations in paragraph 8 of the Answer, state whether to defendant's knowledge, a wax body candle containing and concealed within its interior before burning, different wax coloring materials at different longitudinal locations in the candle body and undissolved in a substantial portion of the body wax, in a manner such that upon burning the candle forms a composite of different colored drippings which become colored by said wax coloring materials.

"A. Had prior to March 13, 1945, been manufactured in the United States, other than by plaintiff, and if so, state:

- "1. The name and address of the manufacturer;
- "2. The time of manufacture; and

"3. The manufacturer's identification of all such candles.

"B. Had prior to March 13, 1945, been sold in the United States, other than by plaintiff, and if so, state:

"1. The name and address of the seller;

"2. The time of the sale; and

"3. The seller's identification of all such candles.

"Answer: A. No.

"Answer: B. No."

"Question 7: If defendant refers in its answer to Interrogatory V, to any candle of its manufacture and sale, state whether defendant knew of any manufacture, use, sale, or description of a similar multiple color drip candle, (other than those manufactured or sold or described by plaintiff herein) prior to defendant's manufacture and sale thereof, and if so, identify fully the prior manufacturer, user, seller of source of description.

"Answer: No." [R. 84.]

"Question 8: If defendant refers in its answer to Interrogatory VI, to any candle of its manufacture and sale, state whether defendant knew of any manufacture, use, sale or description of a similar multiple-colored drip candle (other than those manufactured or sold or described by plaintiff herein) prior to defendant's manufacture and sale thereof, and if so, identify fully the prior manufacturer, user, seller of source of description.

"Answer: No." [R. 85.]

"Question 20: Describe and identify any candles (other than those manufactured by plaintiff) publicly sold on any market prior to defendant's 'Make-a-Rainbow' candle which upon burning produced

similarly, in an unpredictable sequence by reason of the concealment of different coloring materials in the candle, a succession of distinctly and differently colored drippings resulting from the melting of at least a portion of the candle body wax and its acquisition of successively different colors which said portion of the wax did not have before melting.

“Answer: Defendant has no knowledge of any such candles.” [R. 89.]

Finding 16.

Flame coloring candles according to the teachings of Funke, Nelson and Fredericks were not known by defendant to have been sold on any market prior to the filing of the Wilson patent application.

Remarks.

“Question 16: (a) To defendant’s knowledge have candles manufactured as described in any of the patents referred to in Interrogatory 15, been sold in the market in the United States or any other country prior to 1945.

“(b) If the answer to the foregoing is in the affirmative, state the name and address of all such manufacturers or sellers known to defendant.

“Answer: (a) No.

“(b) No answer required.” [R. 89.]

Finding 11.

From May 17, 1949 to and including September 5, 1952, defendant manufactured and sold under the trade-mark “Make-A-Rainbow,” candles which were provided with cotton wicks to which were applied different colored wax, colored by wax-soluble aniline dyes, disposed successively on different portions of the wick along its length,

the candles being finished from such prepared wicks by dipping in white wax to candle size. Infringement of the Wilson patent by those candles so made from May 17, 1949 to September 5, 1952, is admitted by defendant.

That candle was discontinued by defendant September 5, 1952, and since that date defendant's candles have been manufactured by first dipping a wick to form a thin white wax taper of substantially $\frac{1}{4}$ inch thickness upon which there is then painted in successive spaced portions molten wax containing aniline dyes of different colors. The candle is then finished by further dipping to produce a finished candle of about 1 inch maximum diameter, having the colored wax portions covered and concealed with the uncolored wax. The last mentioned candles have been sold under the trademark "Make-A-Rainbow" from September 5, 1952 to date.

Defendant's "Make-A-Rainbow" candle have been sold by it within the jurisdiction of this Court following notice to defendant of the Wilson patent.

Remarks.

"Q. 10: (a) Is the following a true statement concerning defendant's activities up to August 1, 1953?

"From May 17, 1949, to and including September 5, 1952, Muench Kreuzer Candle Company manufactured and sold under the trade-mark 'Make-a-Rainbow' candles which were provided with cotton wicks in which were incorporated various types of aniline dyes disposed successively in different portions of the wick so that on burning the candle presented successively different colored drippings.

"This candle was discontinued September 5, 1952. and all models have been disposed of so that none is available from the defendant for production. Since

September 5, 1952, defendant's candles have been manufactured by first dipping a wick to form a thin taper of substantially one-fourth inch thickness upon which there is then painted in successive spaced portions molten wax containing aniline dyes of different colors. The candle is then finished by further dipping to produce the finished candle, having the colored wax portions covered by uncolored wax.

"The percentage of aniline dye to wax in the material which is painted upon the thin taper is within the range of percentage of due to wax customarily used by defendant and other candle makers in making solid-colored candles. These candles have been sold under the trade-mark 'Make-a-Rainbow' and were recently under the trade-mark 'Color Fall.' Such candles have been sold from September 5, 1952, to date (*i.e.*, August 1953).

"(b) If the foregoing quoted statement is incorrect in any respect please state wherein it requires correction.

"(c) If defendant has manufactured or sold subsequent to August 1, 1953, any candles of the same type as its 'Make-a-Rainbow' and 'Color Fall' candles but of different compositions, describe fully all such different compositions and the procedure of making them into candles, and give the name under which they have been sold.

"Answer: (a) Yes, with the explanation set forth in answer to Interrogatory 10(b).

"(b) At no time did the defendant manufacture a candle in which aniline dyes were directly incorporated in the wick. Defendant's practice, in accordance with the ancient 'muetter farben' (mother color) practice, *was to use a colored wax* which, in the period prior to 1952, was applied directly to the wick and since said period has been applied to a

thin taper or core. The statement in Interrogatory 10 concerning the range of percentage of dye to wax is really meaningless in that this percentage varies in accordance with the strength of the particular batch of dye, the type of the dye and the overall color desired. Mother color is, however wax incorporating a rather concentrated dye." (Italics added.)

"The body of the candles is a mixture of paraffine and stearic acid. The wick is braided cotton nineply.

"(c) Defendant has made no changes in its colored drip candles since August 1, 1953." [R. 86, 87 and 88.]

Finding 17.

Plaintiff commenced manufacture and sale to customers in various parts of the United States, including the Western states, of his "Magi-Color" candles made in accordance with the Wilson patent, and in a manner similar to defendant's first "Make-A-Rainbow" candles, within a month following the filing of the application for the Wilson patent.

Remarks.

Mr. Wilson testified [R. 58] that he commenced manufacture and sale to customers as found by the Court in 1945 [R. 56], Plaintiff's Exhibit 15. Appellant's answer to Interrogatory 10 as set forth above, shows that appellant applied wax-colored dye to the wicks in its first-manufactured "Make-a-Rainbow" candles, exactly as described in the Wilson patent.

Finding 18.

In the burning of defendant's "Make-a-Rainbow" candle manufactured since September 5, 1952, the dyes applied

to the wax taper dissolve in the candle drippings as they are formed, in essentially the same manner as the drippings were colored in defendant's first-manufactured "Make-a-Rainbow" candles in which the colored wax was applied directly to the wick.

Remarks.

Mr. Muench admitted the essential sameness of both candles, *i.e.*, prior and subsequent to September 5, 1952 [R. 226-229]. Note the following concerning Defendant's Exhibit N.

"Q. And the taper of No. 2 is about a quarter inch? A. A quarter to three-eighths.

Q. So the bulk of the wax in the candle has been gained by building up on the taper? A. Yes, sir.

Q. So, therefore, we have the main bulk or body of the candle represented by the wax which has been applied in tapers Nos. 3 and 4? A. Yes.

Q. As you make these candles, as they go out on the market, they appear as we see them here in No. 5, do they not? A. Yes.

Q. The coloring materials are concealed in the candle, are they not? A. Yes, sir." [R. 226-227.]

"Q. When finished candle No. 5 is burned, the heat developed by the wick flame melts the wax adjacent the flame, does it not? A. Yes, sir, it melts the candle wax.

Q. And as the candle wax melts the dye which we see on taper No. 2 simply goes into solution in the melted wax, does it not? A. More or less, yes, sir.

Q. And as the wax accumulates, being colored, the candle tends to crater and spill over, at least at one side, and thus we have the formation of the colored dripping? A. Yes." [R. 228.]

“Q. But insofar as what dissolves in the wax is concerned, in both instances the dye dissolves in the wax in essentially the same way? A. Yes.

Q. That was true of your first Make-a-Rainbow candles, was it not? A. Yes.” [R. 228.]

Finding 19.

Defendant purposely renders its “Make-a-Rainbow” candles capable of profusely dripping by the use of a smaller wick (9 ply and similar to the wick size employed in plaintiff’s “Magi-Color” drip candles) than is used by candle manufacturers in general, and including defendant, in candles which are not made especially to drip.

“Q. How long have you, Mr. Muench, as a candle manufacturer, known what makes candles drip? A. Possibly from the beginning of my inception in the candle business where I gradually learned the details of it.

Q. And that is general knowledge in the candle industry, isn’t it, among candle manufacturers? A. That is right.” [R. 94.]

(By Mr. Muench):

“These candles are made particularly, as all these supposed multi-colored drip candles, with a small wick so they haven’t the capacity to carry the amount of wax.

Any of these candles in a room that has no draft—for instance, with the so-called drip candles—if they are put in with a large wick, won’t drip at all if there is no draft, so they are not really a dripping candle unless the wick is small.” [R. 118.]

“Q. But your company has been making both types? This would be what you might call a pro-

fusely dripping candle, is that no right? A. Yes, sir.

Q. And your company manufacturers those which drip little, and the candles which drip a good deal; is that not right? A. Well, you might say that, yes." [R. 93.]

Finding 20.

The Court further finds that suit was filed on December 5, 1949 in the United States District Court, for the Eastern District of Wisconsin, by plaintiff for infringement of the Wilson patent, against Victrylite Candle Company of Oshkosh, State of Wisconsin, in an Action 6354 entitled "Complaint for Infringement of Patent," which suit after answer by the defendant therein, was concluded by consent decree dated May 5, 1950, holding the Wilson patent valid and infringed; and the Court further finds that plaintiff granted to the said Victrylite Candle Company, by agreement dated April 18, 1950, a license, the granting clause in which reads:

"Reserving in himself, his successors and assigns a single and indivisible right of manufacture, use and sale of candles embodying the invention of said patent, Licensor hereby grants to Licensee an otherwise exclusive license under said patent limited, however, to the manufacture, use and sale of candles having dyed cores as distinguished from dyed wicks and comprising at different points axially of the candle at least two different core colors."

Remarks.

This finding is supported by the testimony of appellee [R. 58-65] and Plaintiff's Exhibits 5, 7, 8 and 9.

Appellant's Specification of Errors.

The facts as demonstrated in the foregoing, together with further references to the Record, will show appellant's exceptions to be without merit.

I.

The District Court erred in concluding that Claims 1 to 6 and each of them of the patent in suit No. 2,464,361 are good and valid in law.

II.

The District Court erred in failing to find that Patent No. 2,464,361 and each of the claims thereof are invalid and void for want of invention over the prior art.

Remarks.

In view of appellant's own admissions that the patent prior art fails even to mention the subject of drip candles, and the complete absence in the prior art of any mention whatever of multi-color drip formation by a single candle, the District Court could not find otherwise than that claims 1 to 6 are good and valid in law.

III.

The District Court erred in failing to find that Patent No. 2,464,361 and each of the claims thereof are invalid and void and unenforceable for having been procured by a fraud perpetrated upon the United States Patent Office by reason of a false representation made in plaintiff's brief on Appeal to the Patent Office Board of Appeals that "The metallic salts and the like employed for flame coloring in the references are not dyes, they are not wax soluble, and they would not affect the color of drippings if the candles were of the drip producing type."

Remarks.

Attention is directed to appellant's answer to interrogatory 18 [R. 202-205] in which appellee had asked appellant *which of 146 compounds and metals* alleged by Nelson and Fredericks to be useable for flame coloring were "capable of practical and workable use in the making of candles like or similar to defendant's 'Make-a-Rainbow' or 'Cascade' candles, and for the effective coloring of drippings produced upon burning of the candles.

In answering, appellant listed 18 materials, 8 of which admittedly were not to be found in either patent [R. 205-213]. Of the remaining 10, appellant undertook to demonstrate that copper acetate and copper chloride would work practicably to color the wax. Copper acetate, relied upon by appellant as its main hope, was used by neither Nelson nor Fredericks in any of their specified examples, and nowhere was this compound specifically mentioned as such, *i.e.*, "copper acetate." The extremity of appellant's need for a compound by which it might work out some semblance of a case, is obvious from its failure to show that even the metal acetate as a class would be workable (which they would not).

We again point to appellant's refusal to demonstrate to the District Court, candles made according to the examples in Nelson and Fredericks, although directly challenged to do so at the beginning of the trial [R. 457]. In view of this refusal and appellant's featuring in its exhibits of copper acetate, which is 1 out of 146 compounds or metals allegedly flame coloring, appellant is in no position to question Wilson's representations to the Patent Office. Appellant itself has demonstrated their validity.

IV.

The District Court erred in concluding that candles manufactured by defendant-appellant since September 5, 1952, infringe Claim 1 of Patent No. 2,464,361.

Remarks.

The record is clear that since September 5, 1952, appellant's candles have been "drip" candles containing "different wax-soluble dyes normally concealed within the interior of the body at different locations longitudinally thereof and normally undissolved in the wax of said body" so that upon burning of the candle, the dyes "dissolving in the melted wax of the body to form multi-colored drippings as the candle progressively burns."

Appellant first applied differently dyed waxes directly to the wick, exactly as described in the Wilson patent, and later departed from this practice only by moving the colored wax outwardly $\frac{1}{8}$ inch from the wick [Ex. N]. The colored wax still remained concealed, near the wick and occupied the same very minor volume relative to the white bulk or body of the candle [R. 251].

V.

The District Court erred in concluding that "Examination of the file history of the Wilson patent application reveals no estoppel against plaintiff's assertion of validity and infringement."

Remarks.

The observations under Specification of Error III above, show that there can be no estoppel as to validity, on any factual or legal basis concerning representations made to the Patent Office.

As to infringement, the Patent Office file history will show that throughout, Wilson continued to assert the patentability of claims as broad as claims 1 to 6 in the patent. Wilson canceled differently worded claims in an effort to satisfy the Examiner, but at no time did he relinquish his position of patentability in broader claim 1, as well as the more specific claims 2 to 6.

VI.

The District Court erred in failing to conclude that Claim 1 of Patent No. 2,464,361 is limited to a candle in which the dyes are “normally undissolved in the wax of said body” and hence not infringed by candles as manufactured by defendant-appellant since September 5, 1952, in which the dyes, prior to application to the taper, are first dissolved in wax.

Remarks.

Claim 1 does not limit the dye portion to being on the wick. Appellant has admitted infringement of the patent (claims 2 to 6) prior to September 5, 1952, when as later, the dyes were “first dissolved in wax” and applied to the wick. Surely it cannot be seriously contended that claim 1 is avoided simply by moving the same dyed wax outwardly $\frac{1}{8}$ inch.

We contend, and appellant has not been able to show the contrary, that the Wilson invention was highly original in the art, that there is nothing whatever in that art to warrant any narrowing interpretation of claim 1 that would show its avoidance by applicant's candles since September 5, 1952, and that appellant's own witness admitted the direct similarity of its candles before and after 1952 [R. 226-229].

VII.

The District Court erred in concluding that the prior art relied upon by defendant does not support defendant's contentions of invalidity in view of the rules and laws as laid down in *J. A. Mohr & Sons v. Alliance Securities Co.*; *Standard Oil Company v. Same* (C. C. A. 9, 1926), 14 F. 2d 799; *Flakice Corporation v. Liquid Freeze Corp.*, (D. C. N. D. Cal., 1955), 130 Fed. Supp. 471; *Derwey & Almy Chemical Company, et al. v. Mimex Company, Inc.* (C. C. A. 2), 124 F. 2d 986.

Remarks.

The direct applicability of these decisions to the facts of this case will be shown later.

VIII.

The District Court erred in concluding that Victrylite Candle Company is neither a necessary nor indispensable party in this Action.

Remarks.

The facts and applicable law are discussed later.

IX.

The District Court erred in concluding that plaintiff is entitled to an injunction and an accounting for profits and damages by reason of defendant's infringement.

The complete failure of appellant to prove either invalidity, non-infringement, estoppel or lack of indispensable party, rendered inevitable the decision given.

X.

The District Court erred in failing to find that all candles drip.

Remarks.

The District Court could not properly have made this finding in view of appellant's own admission [R. 118] that a candle is "not really a dripping candle unless the wick is small."

XI.

The District Court erred in refusing to find, as requested by defendant, that certain of the metallic salts listed in the Fredericks Patent No. 2,184,666, when placed in sufficient quantities on the wick of a candle which drips, with color the drippings of said candle, specifically including copper acetate, cuprice chloride, copper hydroxide and ferric oxide.

Remarks.

Fredericks made a very generalized statement about allegedly workable, but factually unworkable, flame coloring salts. He says nothing about "a candle which drips," and nothing about the use of any salts for wax coloring.

XII.

The District Court erred in failing to find, as requested by defendant, that the use of aniline dyes, both in the wick and as a dye to color the core of a candle a different color than the main body of a candle was old in the art prior to the time when plaintiff made the invention embodied in the patent in suit.

Remarks.

The point is irrelevant since appellant has admitted repeatedly that no prior art teaches a candle capable of forming multi-colored drippings, which is of the essence of the Wilson patent.

XIII.

The District Court erred in finding that none of the prior patents or publications relied upon by defendant refers to a drip candle, or reveals any contemplation of making a candle which characteristically is of a wax dripping type.

Remarks.

Appellant admitted that none of the prior patents says anything about drip candles [R. 118].

XIV.

The District Court erred in failing to find that since 1941 defendant has manufactured and sold, and advertised in its catalog its Star Pillar candles in which wax colored differently than the exterior of the candle drips upon burning.

XV.

The District Court erred in failing to find the German Patent 157,209 of December 28, 1904, discloses a candle which upon burning drips a wax over the exterior of the candle colored differently than said exterior.

XVI.

The District Court erred in failing to find that Great Britain Patent 95 of 1871 discloses a candle which upon burning drips a wax over the exterior of the candle colored differently than said exterior.

Remarks.

XIV, XV and XVI are irrelevant since none of these candles is a multi-color drip candle.

XVII.

The District Court erred in failing to conclude that the patent in suit discloses a mere multiplication of defendant's Star Pillar candle, or of said candle of said German patent No. 157,209 or of said British Patent No. 95 of 1871 and hence no invention over the prior art.

Remarks.

"A mere multiplication" of any of these could at best amount to nothing more than an elongation of same candle. Not one of these has the characteristics emphasized in our discussion under "The Wilson Patent," *supra*, and consequently invention in the Wilson patent is inescapable because Wilson created a candle (1) structurally and compositionally different, which (2) performed in a new manner obviously beyond the contemplation of appellant in its "Star Pillar" candle, or of the German or British patents.

Indispensability of Victrylite Candle Company in This Action.

Finding 20 of the District Court recites the following granting clause in appellee's license to Victrylite Candle Company of Oshkosh, Wisconsin [R. 17-18].

"Reserving in himself, his successors and assigns a single and indivisible right of manufacture, use and sale of candles embodying the invention of said patent, Licensor hereby grants to Licensee an otherwise exclusive license under said patent limited, however, to the manufacture, use and sale of candles having dyed cores as distinguished from dyed wicks and comprising at different points axially of the candle at least two different core colors." [R. 17-18.]

Appellant's arguments concerning the necessity or indispensability of Vicrylite in this action most obviously are as lacking in legal support as are its defenses of invalidity, non-infringement and estoppel. In no true sense was the license grant exclusive. Vicrylite was granted no right whatever under claims 2 to 6 of the patent and as to the broader subject matter of claim 1, appellee reserved "in himself, his successors and assigns a single and indivisible right of manufacture, use and sale of candles embodying the invention of said patent." As the Court found, candles having dyed cores embody the invention of the Wilson patent.

The following cases are applicable:

In *Zenith Radio Corp. v. RCA*, 121 Fed. Supp. 803 (D. C. Del., 1954), Zenith moved to dismiss a counterclaim for defect of parties, urging the indispensability of the absent parties because they held rights in the counterclaimed patents tantamount to co-ownership. The court said:

"Zenith to succeed in its argument must show transfer of 'an undivided portion of the entire interest in the invention' to the absent parties. They must be 'upon equal footing with the patentees' (RCA, GE, WE) 'in all respects' for the 'undivided part assigned' in the counterclaim patents. If the agreements leave in the patentees any distinct rights in the area of their grant not exercisable by grantees, they confer only licenses and pass no property in the monopoly. Cf. *Waterman v. MacKenzie*, 138 U. S. 252, 34 L. Ed. 923. If licensees, AT & T and Westinghouse are not indispensable parties Zenith admits."

In *Min-A-Max Co., Inc. v. Sundholm*, 24 Fed. Supp. 89, 38 U. S. P. Q. 220 (D. C. N. D. Iowa, 1938), the defendant in an infringement suit pleaded defect of parties, alleging Min-A-Max had granted a substantially exclusive license to Steward Warner Corp., with reservations "constituting what defendant termed were mere shop rights," that is reserving rights to manufacture and sell to a specified limited trade, and the court said:

"I find that the license pleaded and adduced in evidence was granted to Steward-Warner Corp. but construe it as being a non-exclusive license, and hold that there is no defect of parties, thus disposing of the question of practice."

In *Bakelite Corp. v. Lubri-Zol Development Corp.*, 34 Fed. Supp. 142 (D. C. D. Del., 1940), in a declaratory judgment suit against defendant patent owner, the court held that defendant's exclusive licensee need not be joined.

In *Bowers v. Atlantic, Gulf and Pacific Co.*, 162 Fed. 895 (C. C. S. D. W. Va., 1907), in an infringement suit, the patentee's exclusive licensee to use and build in designated territory, subject to a reservation in patentee of the right to build in that territory, was held a proper party and not a necessary party.

In *Comptograph Co. v. Universal Accountant Machine Corp.*, 142 Fed. 539, in an infringement suit the court held that the patentee need not join his sole licensee.

In *Frankfort Whiskey Process Co. v. Pepper*, 26 Fed. 336 (C. C., S. D. N. Y., 1885), in an infringement suit brought by the grantee of the patent, the court held that the grantor who had reserved the right to use and to license others to use the process of the patent was not a necessary party plaintiff.

In *Nellis v. Pennack Mfg. Co.*, 13 Fed. 451 (C. C. E. D. Penn., 1882), in a suit by an assignee for infringement the court held that an exclusive licensee to manufacture and sell under the patent was not an indispensable party.

In *Waterman v. MacKensie*, 138 U. S. 252, 34 L. Ed. 923, the Supreme Court stated:

“The patentee or his assigns may, by instrument in writing, assign, grant and convey, either, 1st, the whole patent, comprising an exclusive right to make, use and vend throughout the United States; or 2nd, an undivided part or share of that exclusive right; or 3rd, the exclusive right under the patent within and throughout a specified part of the United States. * * * a transfer of either of these three kinds of interest is an assignment, * * * any assignment or transfer short of one of these is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement.”

Appellant cites *Waterman v. MacKensie*, 138 U. S. 252, 34 L. Ed. 923. Obviously appellee's grant to Vicrylite does not meet any of the three requirements laid down in this decision by the Supreme Court. Accordingly, the facts and cases fully support the District Court's conclusion of law:

5. Vicrylite Candle Company is neither a necessary nor indispensable party in this Action [R. 19].

Applicable Cases Re Asserted Invalidity of the Wilson Patent.

In its conclusions of law, the District Court held:

“4. The prior art relied upon by defendant does not support defendant’s contentions of invalidity in view of the rules and laws as laid down in *J. A. Mohr & Sons vs. Alliance Securities Co.*; *Standard Oil Company vs. Same* (Ninth Circuit Court of Appeals 1926), 14 F. 2d 799; *Flakice Corporation vs. Liquid Freeze Corp.*, 130 F. Supp. 471 (D. C. N. D. Cal., 1955); *Dewey & Almy Chemical Company, et al. vs. Mimex Company, Inc.* (Second Circuit Court of Appeals), 124 F. (2d) 986.” [R. 18.]

These cases are squarely in support of appellee’s case in that they fully bear out the general proposition that a defendant in a patent infringement action cannot make out a valid defense by distortions or attempted conversion of prior art into something foreign to any contemplations of that art, and particularly where, as here in the case of the asserted followings of Nelson, Funke and Fredericks, the defendant convincingly proves the unworkability or inoperativeness of the prior art for its intended or represented purposes.

First we have Judge Learned Hand’s statement of the governing rule, in *Dewey & Almy Chemical Company et al. v. Mimex Company, Inc.* (C. C. A. 2), 124 F. 2d 986, that:

“No doctrine of the patent law is better established than that a prior patent or other publication to be an anticipation must bear within its four corners adequate directions for the practice of the patent

invalidated. If the earlier disclosure offers no more than a starting point for further experiments, if its teaching will sometimes succeed and sometimes fail, if it does not inform the art without more how to practice the new invention, it has not correspondingly enriched the store of common knowledge, and it is not an anticipation.”

Certainly the publications relied on by appellant failed by Mr. Muench’s own admissions, to “bear within its four corners adequate directions” for practice of the Wilson patent. Furthermore, to concede that the earlier disclosures relied upon by appellant offered even “a starting point for further experiments,” would be to dignify them beyond any value which they were shown to have at the trial. The publications did not even conceive of any end objective of a multi-color drip candle.

Directly in point also is the decision of this Court in *J. A. Mohr and Sons v. Alliance Securities Co.*; *Standard Oil Company v. Same* (C. C. A. 9, 1926), 14 F. 2d 799, wherein the Court stated:

“It is to be borne in mind that the prior art here relied upon consists entirely of patents, and that when it is sought by means of prior patents to ascertain the state of the art, ‘nothing can be used except what is disclosed on the face of those patents. They cannot be reconstructed in the light of the invention in suit, and then used as a part of the prior art.’ *Naylor v. Alsop Process Co.*, 168 F. 911, 94 C. C. A. 315; *Frey v. Marvel Auto Supply Co.*, 236 F. 916, 150 C. C. A. 178. And the presumption that a patented combination is new and useful and embodies invention has added force where, as here, it appears that the patents relied upon as showing anticipation were considered by expert patent office officials.

While their judgment is not absolutely binding on a court, it is entitled to great weight and is to be overcome only by clear proof that they were mistaken and that the combination lacks patentable novelty. *Fairbanks v. Stickney*, 123 F. 79, 59 C. C. A. 209; *Hale & Kilburn Mfg. Co. v. Oneonta, C. & R. S. Ry. Co.* (C. C.), 129 F. 598; *MacClemmy v. Gilbert Corset Co.* (D. C.), 221 F. 73; *New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co.* (C. C.), 131 F. 265."

The District Court for the Northern Division in California, had occasion in *Flakice Corporation v. Liquid Freeze Corp.* (1955), 130 Fed. Supp. 471, to pass upon the legal sufficiency of demonstrations of asserted followings of the prior art:

"But care must be exercised in evaluating the effect of these demonstrations. Knowledge after the event is always easy and problems once solved present no difficulties. 'Prior patents "cannot be reconstructed in the light of the invention in suit and then used as part of the prior art."' The prior art must be evaluated by searching to see if the information contained in the patents themselves as distinguished from an after the fact reconstruction, is full and precise enough to enable a person skilled in the art to perform the process or make the machine covered by the patent sought to be anticipated."

The history of this case shows completely and conclusively that appellant's efforts were consumed in an attempt to reconstruct prior patents "in the light of the invention in suit" and to use them "as part of the prior art."

Appellant's position is even less tenable than the defendants' in these cases, because not only did appellant fail to produce a multi-color drip candle following the actual teaching of any prior patent, but in attempting to do so, it proved the unworkability of the patents (Nelson, Fredericks and Funke) even for their purported objects.

Conclusion.

So completely lacking in any factual or legal respects have been appellant's attempted proofs and arguments, that there can be only one logical conclusion to be drawn from its actions, namely, that appellant deliberately and intentionally misappropriated the invention, in the expectancy of being able, because of its size and resources, to overrun the small manufacturer-appellee.

It is believed that this Court will find good reason in law and equity for affirming the decision of the District Court.

Respectfully submitted,

H. CALVIN WHITE,

Attorney for Appellee.

No. 15132

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MUENCH-KREUZER CANDLE CO., INC., a corporation,
Appellant,

vs.

LESTER F. WILSON,
Appellee.

APPELLANT'S REPLY BRIEF.

LYON & LYON,
CHARLES G. LYON,
811 West Seventh Street,
Los Angeles 17, California,
Attorneys for Appellant.

FILED

JAN 10 1957

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
Finding 13 is clearly erroneous.....	2
The patent in suit was procured by a fraud on the Patent Office	3
Non-infringement since September 5, 1952.....	5

TABLE OF AUTHORITIES CITED

CASES	PAGE
D. H. Electric Co. v. M. Stephens Mfg., Inc., 233 F. 2d 879.....	5
Schwinn v. United States, 112 F. 2d 74.....	4

No. 15132
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MUENCH-KREUZER CANDLE Co., INC., a corporation,
Appellant,

vs.

LESTER F. WILSON,
Appellee.

APPELLANT'S REPLY BRIEF.

In its Opening Brief, appellant made three points:

(1) Non-infringement since September 5, 1952, because defendant's candles do not have dye "normally undissolved in the wax of said body" (Patent Claim 1);

(2) Invalidity of Claims 1-6 of the patent in suit as embodying no invention but constituting a mere duplication or multiplication of colors of the single core or wick of the prior Star-Pillar, Housamann (German) or Sterry (British) candles; and

(3) Invalidity of the patent in suit as having been procured by a false representation to the Board of Appeals of the Patent Office "that the metallic salts * * * in the references * * * could not color the drippings even if the candles were of the drip producing type."

None of these arguments has been met by appellee.

Appellee's brief is devoted in the main to quoting the findings of the District Court, on which, of course, he so heavily relies.

But key findings upon which this entire position of appellee must fall are obviously "clearly erroneous."

Finding 13 Is Clearly Erroneous.

Appellee seeks to avoid the effect of the prior art by falsely asserting that none of the prior art relates to a "drip" candle.

Thus appellee has procured from the District Court a finding:

"13. None of the prior patents or *publications* relied upon by defendant refers to a drip candle, or reveals any contemplation of making a candle which characteristically is of a wax dripping type."

This finding is made despite the fact that defendant's catalogues, as published annually from 1940, have advertised its Star-Pillar candle, Exhibit F, as a candle which "*drips red over a white exterior.*" See Defendant's Exhibit C.

It is noted that Exhibit C bears a certificate which proves its publication, a certificate that it was received in the Patent Office Library January 14, 1943.

In view of this incontrovertible evidence, appellant is amazed that appellee should present to the District Court and here rely on Finding 13.

The existence of this publication in the prior art does, however, account for the fancy footwork on page 34 of appellee's brief where, in discussing Specification of Error XIII, which by coincidence challenges Finding 13, appellee makes a quick switch from "patents or *publi-*

cations,” as set forth in the finding, to simply “prior patents.”

Moreover, all candles drip. Numerous candles were produced at the trial having 9, 21 and 30-ply wicks. Exhibit G-2 has a 30-ply wick [R. 189], E-3 a 21-ply wick [R. 233] and H-1 a 21-ply wick [R. 234].

They all dripped, as remarked by the trial court [R. 242], and as this Court can see by inspecting the exhibits, and “If those candles had a 45-ply wick in them, they would drip.” [R. 243]. Plaintiff Wilson admitted this, “There aren’t any candles made that in the draft won’t drip.” [R. 297].

Consequently, we reaffirm our position that the patent in suit is a mere multiplication using two or more colors instead of the one color of the prior Star-Pillar candle, Housamann (German) candle or Sterry (British) candle and hence void for want of invention.

The Patent in Suit Was Procured by a Fraud on the Patent Office.

Appellee has devoted a large portion of its brief to a discussion of the testimony, especially on cross-examination, of defendant’s witness, Muench, particularly with respect to the evidence offered to show that certain metallic salts referred to in the Nelson and Fredericks prior art patents, when applied to the wicks of candles as proposed by the patentees would color the drippings of those candles.

The purpose of this evidence was to show that certain of the metallic salts would color the drippings and that Wilson’s flat assertion to the Board of Appeals that “they could not affect the color of drippings, even if the candles were of the drip producing type” was false.

Let us assume the worst. Let us assume that appellee has completely destroyed the evidence of Mr. Muench and that defendant has not thereby proved that such metallic salts will color the drippings.

Still, the plaintiff has proved it for us. Plaintiff's expert witness, Bechtold, testified:

"The Court: But if you used more than that, they would color the drippings?

The Witness: Yes.

The Court: And you could get green and red—and what is the other?

Mr. Lyon: Blue.

The Court: Blue?

The Witness: Drippings, yes." [R. 288].

And plaintiff has stipulated "that it was known in the candle-making art * * * that metallic salts * * * were useful in the coloring of candles, * * *" [Deft. Ex. B; R. 393].

Clearly, the flat assertion made to the Patent Office Board of Appeals was made with intent that the Board rely upon it, as they did, and order the granting of the patent which, up to that time, had been denied. This assertion of fact was made despite the fact that plaintiff made no inquiry as to whether it was true and did not in fact know whether it was.

Thus, all of the elements of fraud appear here. Certainly, if a "reckless misrepresentation" is enough to revoke a man's United States citizenship, *Schwinn v. United States*, 112 F. 2d 74 (9 Cir.), it is enough to revoke his patent.

Non-infringement Since September 5, 1952.

In our Opening Brief, we pointed out that both in the plain meaning of Claim 1 and by reason of a file wrapper estoppel, defendant's candles, which are made by painting wax containing dye dissolved therein on a taper prior to finishing the candle, cannot be infringements of Claim 1, being limited as it is to a candle in which the dyes are "normally undissolved in the wax of said body."

There are, of course, only two parts to a candle, the wick and the body. Plaintiff has a patent on a candle in which dye is applied to the wick *and not to the body*. Defendant applies dye to the body *and not to the wick*. A clearer case of non-infringement is hard to imagine.

Appellee's only answer to this argument is that we cannot escape infringement by moving the dye $\frac{1}{8}$ inch (Appellee's Br. p. 31). But here, appellee misconceives the law of file wrapper estoppel. By amending application Claim 18 to include the phrase "normally undissolved," the patentee effectively excluded "dissolved," and it matters not that the point at which the dye is initially dissolved is a mere $\frac{1}{8}$ inch from the wick. It does matter that the accused candles contain dye dissolved in the candle body whereas Claim 1 was deliberately amended to be "Normally undissolved in the wax of the body."

Indeed, in the case relied upon in our Opening Brief, *D. H. Electric Co. v. M. Stephens Mfg., Inc.*, 233 F. 2d 879 (9 Cir.), a difference of 1° - 5° from perpendicular was enough to distinguish and render non-infringed claims limited to "substantially perpendicular."

We have pointed out in our Opening Brief that the District Court's interpretation of the phrase "normally

undissolved in the wax of said body” would make the claim co-extensive with Claim 18 of the application prior to the amendment and that the District Court, in effect, ignored the amendment.

As pointed out in the case just cited, this the court was not at liberty to do, and conclusion of law 3, reading as follows:

“3. Examination of the file history of the Wilson patent application reveals no estoppel against plaintiff’s assertion of validity and infringement.”

is clearly erroneous.

We ask this simple question of appellee: What did the referred to amendment of Claim 18 add to Claim 18? Or, how can “dissolved” become “undissolved?”

Clearly, the Court erred in concluding that defendant’s candles, as manufactured since September 5, 1952, infringed Claim 1 of the patent in suit.

In summary, we believe that we have demonstrated that under applicable rules of law, plaintiff’s patent is invalid on two grounds and has not been infringed by defendant in its production since September 5, 1952.

Respectfully submitted,

LYON & LYON,

CHARLES G. LYON,

Attorneys for Appellant.

No. 15134

United States
Court of Appeals
for the Ninth Circuit

MORRIS TRIEBER,

Appellant,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of
the Estate of Gayne Sales Co., Inc., a Corpora-
tion, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JUL 12 1956

Phillips & Van Orden Co., 870 Brannon Street, San Francisco, Calif.—7-6-56

PAUL P. O'BRIEN, CLERK

No. 15134

United States
Court of Appeals
for the Ninth Circuit

MORRIS TRIEBER,

Appellant,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of
the Estate of Gayne Sales Co., Inc., a Corpora-
tion, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer and Return of Morris Trieber to Order to Show Cause and Motion to Dismiss Peti- tion of Trustee and to Discharge Order to Show Cause for Want of Jurisdiction	20
Ex. A—Second Amended Complaint	26
B—Minute Order	42
Attorneys, Names and Addresses of	1
Certificate of Clerk	55
Notice of Appeal	54
Objections to Allowance of Claim	8
Order of Adjudication and Reference, Etc.	3
Order Dismissing Petition for Review	52
Order of Referee Filed January 10, 1956	43
Order to Show Cause	18
Petition of Morris Trieber for Review of Order of Referee by Judge	44
Proof of Claim	4
Statement of Points	58

NAMES AND ADDRESSES OF ATTORNEYS

JOSEPH A. BROWN,
De Young Building,
San Francisco, California,
For Appellant.

JAMES M. CONNERS,
Board of Trade Building,
444 Market Street,
San Francisco, California,
For Appellee.

United States District Court, for the Northern
District of California, Southern Division

No. 43523

In the Matter of

GAYNE SALES CO., INC., a California Corpo-
ration, Bankrupt.

At San Francisco, in said District, on the 24th day
of August, 1954.

ORDER OF ADJUDICATION AND
REFERENCE, ETC.

The Petition of Gayne Sales Co., Inc., a Califor-
nia Corporation, filed on the 24th day of August,
1954, that it be adjudged a bankrupt under the Act
of Congress relating to Bankruptcy, having been
heard and duly considered, and no opposition being
made thereto,

It Is Adjudged that the said Gayne Sales Co.,
Inc., etc., is a bankrupt under the Act of Congress
relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding
be, and it is hereby referred to Burton J. Wyman,
one of the Referees in Bankruptcy of this Court
who will be in charge thereof, and to Bernard J.
Abrott, Referee in Bankruptcy of this Court, in the
event Burton J. Wyman shall be unable to act to
take such further proceedings therein as are re-
quired and permitted by said Act, and that the said
Gayne Sales Co., Inc., shall henceforth attend be-

fore the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Recorder," a newspaper published in the County of San Francisco, State of California, within the territorial district of this Court, and the County within which said bankrupt resides.

Dated August 24th, 1954.

/s/ EDWARD P. MURPHY,
District Judge.

[Endorsed]: Filed August 24, 1954.

[Title of District Court and Cause.]

PROOF OF CLAIM

State of California,
City and County of San Francisco—ss.

Morris Trieber, of San Francisco, in the County of San Francisco, and State of California, personally known to me, being duly sworn, deposes and says:

That he is the owner of the business known as M. Trieber, and trades under that name.

That Gayne Sales Co., Inc., a California corporation, the above named bankrupt or debtor, by or against whom a petition for adjudication of bankruptcy or for an arrangement or for reorganization has been filed, was at and before the filing of such petition and still is justly and truly indebted or liable to claimant in the sum of \$3162.24.

That the consideration of said debt or liability is as follows: (a) A balance due upon an open book account for goods sold and delivered by claimant to said bankrupt or debtor within four years last past, bill of items of which account are attached hereto as Exhibit "A" and made a part hereof.

That the items of said debt became due upon the dates as respectively set forth upon said bills of items marked "Exhibit A."

For salary for services performed for the corporation pursuant to an oral agreement	\$1600.00
For money paid by claimant on a note owing by the bankrupt, which note claimant had guaranteed, and on which note claimant paid	750.00
For goods, wares and merchandise sold and delivered to the bankrupt.....	382.65
Paid by claimant on behalf of bankrupt on a judgment rendered against the bankrupt, which judgment this claimant guaranteed	408.89
	<hr/>
	\$3141.54

also:

For the further sum of costs expended for an action filed thereon in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled "Morris Trieber, Plaintiff, vs. Gayne Sales Co., Inc., a corporation, Defendant," numbered 437 732, as follows,

Paid to County Clerk for filing action	\$16.50	
Paid to Sheriff	2.70	
Notary fees	1.50	20.70
		<hr/>
		\$3162.24

That no part of said debt or liability has been paid; that there are no set-offs or counterclaims to the same; that no note or other negotiable instrument has been received for said account or any part thereof (except the note....hereto attached as Exhibit "B") and that no judgment has been rendered thereon (except as hereinabove set forth). That claimant does not hold, and has not, nor has any person, by his or its order, or to deponent's knowledge or belief, for claimant's use, had or received, any security or securities for said debt or liability except as disclosed herein.

This claim is free from usury as defined by the laws of the State where the debt was contracted.

Claimant also herewith authorizes John O. England, or any one of them, with full power of substi-

tution, to attend all meetings of creditors of the bankrupt or debtor aforesaid and all adjournments thereof at the places and times appointed by the Court, and for claimant and in his or its name to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to bankruptcy, to vote for a trustee or trustees of the estate of said bankrupt or debtor, and for a committee of creditors, to accept any arrangement or wage earner's plan proposed by said bankrupt or debtor, and to receive payment of dividends and payment or delivery of money or of other consideration due claimant under such arrangement, reorganization, or wage earner's plan and for any other purpose in claimant's interest whatsoever, and with like powers to attend and vote at any other meeting or meetings of creditors or sitting or sittings of the Court which may be held therein for any of the purposes aforesaid, and to receive or waive any of the notices required by Section 58 of the Bankruptcy Act, and claimant does hereby revoke all letters of attorney heretofore given by claimant in this matter.

In witness whereof, and with the intention of having one individual signature suffice for the above deposition and this letter of attorney, said claimant has hereunto subscribed his name, or, if a corporation, has caused such subscription to be made by said officer or agent as its corporate act, or, if a partnership, has caused such subscription to be made by said member thereof on its behalf, or, if an

individual or partnership acting through an agent or attorney, has caused such subscription to be made by such attorney or agent as the act of said principal, this 15th day of October, 1954.

(Personal signature here only):

/s/ MORRIS TRIEBER,

For:

.....,

(Name of Firm.)

Subscribed, sworn to and acknowledged before me this 15th day of October, 1954.

[Seal] /s/ MAE L. MILLER,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires May 4, 1958.

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

TRUSTEE'S OBJECTIONS TO THE ALLOW-
ANCE OF THE CLAIM OF MORRIS
TRIEBER AND PETITION FOR TURN-
OVER ORDER

To the Honorable Burton J. Wyman, Referee in
Bankruptcy:

Now comes John O. England, as Trustee of the
bankrupt above named, and files his objections to

the allowance of the claim of Morris Trieber as a claim against the said bankrupt estate, or otherwise, in the sum of \$3,162.24, or at all, and for grounds of objection alleges:

Denies that at the time of the filing of the Petition in Bankruptcy herein, said bankrupt was indebted to claimant in the sum of \$3,162.24, or in any sum, or at all.

As a Further, Separate and Distinct Defense to the Allowance of Said Claim, and as Grounds for Further Relief, the Trustee Alleges:

I.

That during all of the times herein referred to, the bankrupt corporation was duly organized and existing as a corporation under and by virtue of the laws of the State of California.

II.

That said corporation was originally organized under the laws of the State of California as the Arian-Gayne & Associates, Inc., and thereafter the said Articles of Incorporation of said corporation were amended and by said amendment the name thereof was changed to Gayne Sales Co., Inc., a corporation, the present name of the bankrupt.

III.

That from the inception of the said incorporation and during all of the times mentioned herein, the said Morris Trieber was one of the incorporators of the said corporation, and together with

I. E. Arian, Jerome R. Gayne and Samuel Gayne, was during all of the times herein referred to, a director of said corporation, and that the said Morris Trieber was at all times herein referred to an officer of said corporation, to wit, the secretary thereof.

IV.

That heretofore and on or about the 8th day of March, 1951, at a meeting of the Board of Directors of said corporation, at which all of the directors aforementioned were present, and at which meeting the said Morris Trieber was present as director and as secretary of the said corporation, the said corporation adopted the following resolution:

“Resolved, that the Secretary of this corporation, Morris Trieber, shall forthwith make application to the Commissioner of Corporations of the State of California for permission to issue capital stock of this corporation, as follows:

“To I. E. Arian, for the transfer by him to this corporation of the business carried on and conducted by him at 1151 Mission Street, including generally U. S. merchandise, new and used clothing, camping equipment, hunting clothes, shoes and leggings, and general merchandise of all kinds, including fixtures and office equipment and the good will of said company now operated under the name of U. S. Army Surplus and I. E. Arian, one hundred (100) shares of the capital stock of this corporation of the par value of Ten Thousand Dollars (\$10,000.00), and to pay to him the sum of Twenty-

five Hundred Dollars (\$2500), which sum has already been paid.

To Jerome R. Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the sum of Ten Thousand Dollars (\$10,000) in cash.

To Samuel Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the transfer to this corporation of merchandise of the fair and reasonable value of \$6,708.18, and the payment in cash of \$3,291.82.

To Morris Trieber, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the transfer by him to this corporation of merchandise of the fair and reasonable value of \$8,967.10 and payment in addition thereto of cash in the sum of \$1,032.90.”

V.

That said resolution was adopted upon the reliance of the said Board of Directors upon the representations of the said Morris Trieber at that said meeting that he, the said Trieber, owned surplus merchandise of the kind and character which said corporation was organized to sell of the fair and reasonable market value of \$15,675.28; that he, the said Morris Trieber, was indebted to Samuel Gayne, one of the directors of the said corporation, in the sum of \$6,708.18; that he, the said Trieber, and Samuel Gayne had agreed between themselves that

said indebtedness of Trieber to Gayne was to be paid by the said Trieber delivering to the said corporation on behalf of Gayne, merchandise of the reasonable value of \$6,708.18 in partial payment of stock to be issued to Samuel Gayne by the said corporation upon approval by the Department of Investment, Division of Corporations of the State of California, and that he, the said Trieber, would in consideration of the said Samuel Gayne, I. E. Arian and Jerome Gayne subscribing for \$10,000 worth of stock to be paid for as follows:

By I. E. Arian, by merchandise of the reasonable value of his \$10,000.00 subscription;

By Jerome Gayne, by the payment of cash for his \$10,000.00 worth of stock;

By Samuel Gayne, by the payment by Trieber in his behalf of merchandise of the value of \$6,708.18, and cash in the sum of \$3,291.82.

That he, Trieber, would deliver to said corporation, in payment of his subscription, merchandise of the reasonable value of \$8,967.10 and cash in the sum of \$1,032.90.

That said directors, relying upon said representations, and believing the same to be true, did adopt the resolution aforementioned.

That thereafter and on or about the 22nd day of March, 1951, in line with said resolution, and with the full knowledge and consent of the said Trieber, and believing the representations aforementioned of the said Trieber, and in reliance thereon, the

officers and directors of said corporation filed an Application for Permit to Sell and Issue Stock, to wit, one hundred (100) shares to each of the persons heretofore named, for Ten Thousand Dollars (\$10,000.00), which said stock was to be paid for as set forth in said resolution aforementioned.

VI.

That thereafter and on the 28th day of March, 1951, the Commissioner of Corporations, State of California, issued a permit for the issuance and the sale of four hundred (400) shares of stock to the said persons named, for the consideration set forth in the resolution aforementioned; that said permit further provided that the stock shall be issued by the 28th day of September, 1951; that said permit further required the appointment of an escrow holder to be approved by the said Commissioner, which escrow holder was to hold the stock issued to the persons aforementioned until the further order of the said Commissioner of Corporations; that no further order of the said Commissioner of Corporations was thereafter made.

VII.

That thereafter the directors of said corporation, with the full knowledge and consent of the said Morris Trieber, and in reliance on the said representations of the said Trieber, and with the approval of the Commissioner of Corporations, named and designated one Joseph A. Brown, an attorney at law, as said escrow holder; that the resolution

appointing the said Joseph A. Brown as said escrow holder was adopted at a special meeting duly and regularly held on the 29th day of March, 1951, and a certified copy thereof was duly filed with the Division of Corporations by the said Morris Trieber as secretary on the 4th day of April, 1951, and said escrow holder was approved by the Commissioner of Corporations on the 6th day of April, 1951.

VIII.

That thereafter the said Morris Trieber, on or about the 30th day of April, 1951, represented to the directors and officers of said corporation that he had delivered to the said corporation merchandise of the reasonable value of \$15,675.28, being the merchandise hereinabove referred to and delivered to said corporation in payment of stock as follows:

\$6,708.18 against the stock to be issued to Samuel Gayne;

\$8,967.10, in payment of the stock to be issued to Morris Trieber.

That in reliance upon the said representations of the said Trieber, so made on or about April 30, 1951, and believing the same to be true, the said corporation, on the said 30th day of April, 1951, pursuant to the Permit aforementioned, issued one hundred (100) shares of stock to each of the following named persons, for which stock said persons paid, or in the instance of Morris Trieber and Samuel Gayne, allegedly paid, the consideration therefor:

I. E. Arian, 100 shares of the par value of \$100.00 each, \$10,000.00 paid for by the said I. E. Arian in merchandise of the reasonable value of \$10,000;

Jerome R. Gayne, 100 shares of the par value of \$100.00 each, for \$10,000.00 cash;

Samuel Gayne, 100 shares of the par value of \$100.00 each, in consideration of the alleged delivery to the said corporation in his behalf of merchandise of the reasonable value of \$6,708.18, as represented to said corporation by the said Morris Trieber, was delivered by him to said corporation, and cash in the sum of \$3,291.82;

Morris Trieber, 100 shares of the par value of \$100.00 each, in consideration of the alleged delivery to said corporation of merchandise of the reasonable value of \$8,967.10, as was represented by said Trieber, was by him delivered to said corporation, and cash in the sum of \$1,032.90.

That certificates numbered 1, 2, 3 and 4, respectively, were issued to said parties and delivered to the escrow holder on the 12th day of July, 1951, on behalf of said parties respectively, which escrow holder in turn issued a receipt to each of said parties for his said shares, setting forth that he held said certificates for the said parties, and filed a copy thereof with the Commissioner of Corporations of the State of California.

IX.

That thereafter and within three years last past, the officers and directors of said corporation, other

than the said Trieber, for the first time discovered that the representations of the said Trieber made to the said corporate officers and directors as above alleged on or about the 8th day of March, 1951, were false and untrue and were known by the said Morris Trieber to be false and untrue, and discovered that said Trieber did not own or control any surplus or other property which was of the value of \$15,675.28, or of any value whatsoever; that but for said false and untrue representations, said directors would not have adopted the said resolution so adopted on said day, nor would they have taken the further steps hereinabove outlined as having been taken, before the Division of Corporations of the State of California; that within the three years last past, the said officers and directors of said corporation, for the first time, discovered that the representations of the said Morris Trieber made to the officers and directors of said corporation on or about the 30th day of April, 1951, to the effect that he had delivered to the said corporation merchandise of the fair and reasonable value of \$15,675.28 in partial payment of the stock as hereinabove alleged, for which stock was issued to him and Samuel Gayne, were in each and every instance false, fraudulent and untrue, and that the said Morris Trieber did not deliver any merchandise to the said corporation of any value whatsoever, either in payment of any stock issued to him, or in payment of the stock issued to the said Samuel Gayne as aforementioned, and that the said Morris Trieber falsely,

fraudulently and wilfully misrepresented to the said corporation the delivery of said merchandise. That the said officers and directors of the said corporation believed said representations to be true and belief thereon, and but for said belief and reliance, would not have issued the stock hereinabove referred to to the said Morris Trieber and/or Samuel Gayne.

That by reason of the said Morris Trieber's false, fraudulent and wilful misrepresentations as hereinabove set forth, and the reliance thereon by the said corporation's directors and officers, the said corporation and the creditors of said corporation have been damaged in the sum of \$15,975.28, plus interest at the rate of seven per cent (7%) per annum on said sum from the 7th day of April, 1951, to date.

X.

That in doing the things herein alleged, the said Trieber acted wilfully, maliciously and wantonly and has been guilty of oppression, fraud and malice and that said Trieber's acts were in direct violation of the Rules and Regulations and Laws applicable to the sale of corporate stock and the payment therefor, and by reason thereof caused said corporation embarrassment, caused said corporation to issue false and fraudulent statements to creditors and banks, to the further damage of the said corporation in the sum of \$10,000.00, and by reason of the foregoing, the said corporation demands exem-

plary and punitive damages against the said Morris Trieber in the sum of \$15,000.00.

Wherefore, said Trustee prays that an Order be made and entered disallowing the claim of the said Morris Trieber in the sum of \$3,162.24, and the whole thereof, and that no allowance be made for any sum whatsoever on said claim, and for an Order disallowing said claim unless and until said claimant pays to said Trustee the sum of \$40,675.28, together with interest at legal rate on \$15,675.28 from April 30, 1951, forward, and that said claimant be ordered to pay said sum to the Trustee herein, together with said Trustee's costs incurred herein, and for such further and different Order as may be just and proper in the premises.

JOHN O. ENGLAND,
Trustee,

By /s/ JAMES M. CONNERS,
One of His Attorneys.

Duly verified.

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the reading and consideration of the Objections filed herein by John O. England, Trustee of the estate of the bankrupt above named, to the

allowance of the claim of Morris Trieber, now, on motion of James M. Conners, attorney for said Trustee,

It Is Hereby Ordered that Morris Trieber appear and show cause before me, the undersigned Referee in Bankruptcy, at my courtroom, Room 609, Grant Building, 1095 Market Street, San Francisco, California, on Thursday, the 7th day of July, 1955, at the hour of 2 o'clock p.m. of said day, if any he has, why the relief prayed for by the Trustee in said Objections to allowance of the claim of Morris Trieber, should not be granted.

It Is Further Ordered that service of this Order be made by delivering a copy thereof, together with a copy of the Trustee's Objections herein referred to, to the said Morris Trieber at least 10 days prior to the return date hereof.

Dated this 20th day of June, 1955.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

ANSWER AND RETURN OF MORRIS
TRIEBER TO ORDER TO SHOW CAUSE
AND MOTION TO DISMISS PETITION
OF TRUSTEE AND TO DISCHARGE
ORDER TO SHOW CAUSE FOR WANT
OF JURISDICTION

To the Honorable Burton J. Wyman, Referee in
Bankruptcy of the Above-Entitled Court in and
for the City and County of San Francisco in
and for the State and District Aforesaid:

Now comes Morris Trieber upon whom it has been
heretofore served an order issued by your Honor
commanding him to appear before your Honor on
Thursday, the 7th day of July, 1955, at the hour
of two o'clock p.m., then and there to show cause
why the relief prayed for by John O. England,
Esq., as Trustee of the estate of the bankrupt above
named, should not be granted; and, as commanded
by your Honor in the said order which was issued
the 20th day of June, 1955, files this, his answer
and return to the aforesaid order, and moves that
the said order be discharged and held for naught;
and in that behalf most respectfully represents and
shows to your Honor:

I.

That this Honorable Court has not, nor has your
Honor as Referee in bankruptcy of said Honorable
Court any jurisdiction to hear or determine the pe-
tition of said Referee which is annexed to the said

order to show cause, or to make any order thereon or to grant any of the relief prayed for by the said Trustee; and in this behalf the said Morris Trieber further shows to your Honor that this proceeding presents a case of a contest between the Trustee in bankruptcy and a third person who is not a party to the bankruptcy proceeding and whose rights, claims and defense cannot be summarily adjudicated by your Honor or by this Honorable Court in this proceeding; and that it further appears that the aforesaid petition of said referee in bankruptcy is a purported claim against the said Morris Trieber for damages alleged to have been suffered by the said bankrupt by alleged fraudulent and wilful misrepresentation alleged to have been made by said Morris Trieber, and that it is further alleged in Paragraph X of said petition that the said bankrupt corporation suffered additional damages in the sum of \$10,000; and that it is further alleged that the said corporation demands exemplary and punitive damages against the said Morris Trieber in the sum of \$15,000; and the said Trustee in the party of the said petition prays for an order by your Honor that the said Morris Trieber pay to said Trustee the sum of \$40,675.28, together with interest at legal rate on the sum of \$15,675.28 from April 30, 1951, forward; that your Honor has no jurisdiction to make any such order, and that this Honorable Court has no jurisdiction to make any such order; that such an order or judgment could be made only if a trial before a court of competent jurisdiction, and after a verdict of a jury duly em-

paneled and sworn to try the cause, or upon findings made by the court in such cause, if trial by jury were waived; and in this behalf the said Morris Trieber further represents and shows to your Honor that this Honorable Court would in any event have no jurisdiction of any action brought by the said Trustee in bankruptcy to recover said sum or any other sum of money claimed to be due from said Morris Trieber to said bankrupt, by reason of any alleged fraud, or otherwise, for the reason that there is no diversity of citizenship between the parties, and the jurisdiction of any such action is in the Court of the State of California whose jurisdiction cannot be ousted by any order that your Honor might make.

II.

And for Further Answer and Return to the Said Order to Show Cause and as Further Ground for the Dismissal and Discharge of the Same and for Further Ground of Objection to the Jurisdiction of This Court to Hear and Determine Any of the Matters and Things Set Forth in the Aforesaid Petition of the Said Trustee in Bankruptcy, the Said Morris Trieber Alleges and Shows:

That all and singular the matters and things set forth by the said trustee in bankruptcy as grounds for the order and relief sought herein by the said trustee, and all and singular the claims of the said trustee therein set forth cannot be maintained by said trustee in this proceeding for the reason that

the said trustee is barred and precluded from maintaining the same by virtue of a said judgment and order heretofore, to wit, on the 3rd day of August, 1954, duly given, made and entered in and by the Superior Court of the State of California in and for the City and County of San Francisco, and numbered therein 431,888 in which Gayne Sales Co., Inc., a corporation, the bankrupt in this proceeding, was plaintiff and the said Morris Trieber was defendant in which a certain second amended complaint for damages for fraud, breach of contract and money had and received was sustained by said Superior Court without leave to amend; that the said second amended complaint was based upon the same purported cause of action and involved in all respects the said matters and things and all and singular the same claims as are set forth in the present proceeding by the said Referee in bankruptcy, all of which from the said second amended complaint in the action last aforesaid, a copy of which is hereunto annexed as Exhibit "A" and made a part hereof, fully and at large appears.

That a copy of the Minute Order sustaining the said demurrer of the said Morris Trieber to the said complaint of the said Gayne Sales Co., Inc., a corporation, without leave to amend is hereunto annexed and made a part hereof in like manner and with like effect as if heretofore set forth in its entirety.

And in this behalf the said Morris Trieber further shows to your Honor that thereafter and on the

11th day of August, 1954, the said Gayne Sales Co., Inc., appealed from the order of said Superior Court to the Supreme Court of the State of California from the order of the said Superior Court sustaining the demurrer of the said Morris Trieber to the second amended complaint of Gayne Sales Co., a corporation, the bankrupt herein, without leave to amend; and the said Morris Trieber further shows that thereafter, and prior to the first day of December, 1954, the said Supreme Court of the State of California, in the exercise of the jurisdiction conferred upon it by the Constitution of the State of California, duly transferred the said appeal to the District Court of Appeal of the State of California in and for the First Appellate District Division Two, and that on the first day of December, 1954, the said Gayne Sales Co., Inc., a corporation, filed in said District Court of Appeals a certain brief, in which the said corporation sets forth in substance and effect all of the matters and things now set forth in the present proceeding by the said Referee in bankruptcy; that thereafter and on the 20th day of December, 1954, the said Morris Trieber filed in the said District Court of Appeals, a notice of motion to dismiss the said appeal of the said Gayne Sales Co., Inc., from the said order sustaining the said demurrer to the second amended complaint without leave to amend, and filed therewith a Memorandum of Points and Authorities in support of the said motion;

That thereafter and on the 10th day of January, 1955, the said motion to dismiss the said appeal

from the said order of said Superior Court, came on regularly to be heard before the said District Court of Appeals and was argued by counsel; in consideration whereof it was by the said District Court of Appeals, ordered, adjudged and decreed that the said motion be granted and that said appeal of the said Gayne Sales Co., Inc., be dismissed; and that by reason of all and singular the premises, the said judgment in the aforesaid action of Gayne Sales Co., Inc., v. Morris Trieber, is *res judicata* as to all and singular the matters before your Honor and before this Honorable Court in the instant cause, and the said Gayne Sales Co., Inc., and its said trustee in bankruptcy are, and each of them is, estopped and concluded from seeking the order prayed for herein and from obtaining any of the relief sought by them, or by either of them; and your Honor and this Honorable Court are likewise estopped and precluded from granting any relief in the premises to the said bankrupt or to the said trustee in bankruptcy.

III.

And for Further Answer and Return to the Said Order to Show Cause Said Morris Trieber Respectfully Shows to Your Honor:

That the purported cause of action and each and every of the said purported causes of action and any and all matters and things whatsoever set forth herein by the said Trustee in bankruptcy are barred by the Statute of Limitations as set forth in Subdivision 4 in Section 338 of the Code of Civil Procedure of the State of California.

Wherefore the said Morris Trieber prays that the said order to show cause be dismissed and discharged, that the said trustee take nothing thereby, that it be considered and held that this Court has no jurisdiction of this proceeding and that said Morris Trieber be hence dismissed without delay.

/s/ JOSEPH A. BROWN,

Attorney for Morris Trieber.

Duly verified.

EXHIBIT "A"

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 431,888

GAYNE SALES CO., INC., a Corporation,

Plaintiff,

vs.

MAURICE TRIEBER,

Defendant.

SECOND AMENDED COMPLAINT FOR DAMAGES FOR FRAUD, BREACH OF CONTRACT AND MONEY HAD AND RECEIVED

Comes now the plaintiff and complains of the defendant above-named and for cause of action alleges:

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That heretofore and prior to the commencement of this action said plaintiff corporation was organized as the Arian-Gayne & Associates, Inc., and thereafter the Articles of Incorporation of said corporation were amended and the name thereof changed to the name of the plaintiff corporation.

III.

That during all of the times herein mentioned defendant was one of the incorporators of said corporation. That defendant together with I. E. Arian, Jerome R. Gayne and Samuel Gayne and during all of the times herein mentioned the above named incorporators were directors of said corporation and the defendant was also an officer of said corporation, to wit, the secretary thereof.

IV.

That heretofore and on or about March 8, 1951, at the first meeting of the Board of Directors of the plaintiff corporation, duly and regularly held, at which all directors were present and acting, the said defendant Maurice Trieber, orally represented to the officers and directors of said corporation:

A. That he, the said defendant, was indebted to one Samuel Gayne, a director of said corporation, in the sum of \$6,708.18;

B. That he, the said defendant, was the owner of and had in his possession general surplus merchandise of the type, kind and character which said corporation was organized to sell, of the fair and reasonable value of \$15,675.28;

C. That he and the said Samuel Gayne had, between themselves, orally agreed:

(1) That he, the said defendant, was then and there indebted to Samuel Gayne in the sum of \$6,708.18;

(2) That said Samuel Gayne orally agreed to accept payment of said indebtedness in cash or in merchandise (as described in subparagraph B above), providing said corporation would accept said merchandise as part payment of 100 shares of its capital stock to be issued to Samuel Gayne.

V.

That said defendant, Maurice Trieber, orally offered to deliver the said merchandise aforementioned to the fair and reasonable value of \$15,675.28 to the said corporation upon the following considerations and under the following terms and conditions:

A. If one I. E. Arian, a director of said corporation who was then and there present, would transfer to the said corporation all surplus merchandise owned by him in a certain business conducted at 1151 Mission Street, including new and used clothing, camping equipment, hunting clothes, shoes and

leggings, and various other general merchandise including the fixtures, all of the fair and reasonable value of \$12,500.00, in consideration of the said corporation issuing to him one hundred (100) shares of its capital stock of the par value of Ten Thousand Dollars (\$10,000.00), and in further consideration of the corporation paying to the said I. E. Arian a sum of \$2,500.00 in cash.

B. If one Jerome R. Gayne, a director of said corporation who was then and there present, would purchase one hundred (100) shares of the capital stock of said corporation and pay therefor the sum of Ten Thousand Dollars (\$10,000.00) in cash.

C. If Samuel Gayne, a director of said corporation and then present, would purchase one hundred (100) shares of the capital stock of said corporation of the par value of Ten Thousand Dollars (\$10,000.00), and pay therefor follows: merchandise of the character described in Paragraph IV, subparagraph B hereof, of the fair and reasonable value of \$6,708.18 to be delivered to said corporation by the said defendant Maurice Trieber, which delivery of merchandise was to be made to said corporation on behalf of the said Samuel Gayne and in payment to the said Samuel Gayne of a sum of \$6,708.18, then and there admittedly owing to him by the said defendant Maurice Trieber, and in further consideration of the said Samuel Gayne paying to said corporation for said stock the additional sum of \$3,291.82 in cash.

D. If said corporation would issue to the said defendant Maurice Trieber one hundred (100) shares of the capital stock of said corporation of the par value of Ten Thousand Dollars (\$10,000.00), for which the said Maurice Trieber would pay as follows: delivery of general merchandise to said corporation of the fair and reasonable value of \$8,967.10 as part payment thereof, and payment of the balance of the said \$10,000.00 to be made by the said Maurice Trieber in cash, to wit, the sum of \$1,032.90.

That the offer aforementioned was made upon the condition that the said corporation make application to the Commission of Corporations, Department of Investments, of the State of California, for a permit for the issuance and sale of stock to the persons above named upon the terms and conditions hereinabove mentioned.

That the said I. E. Arian, Samuel Gayne and Jerome R. Gayne orally accepted the offer of the said defendant Trieber, and each agreed to purchase one hundred (100) shares of the capital stock of said corporation of the par value of Ten Thousand Dollars (\$10,000.00) upon the terms of the offer of the said Maurice Trieber and the directors of said corporation accepted the said offer by its acts as hereinafter set out.

VI.

That thereafter and at the said directors' meeting hereinabove referred to held on the 8th day of March, 1951, acting upon and in full reliance on

the representations and offers of the defendant, Maurice Trieber, the directors of plaintiff corporation adopted the following resolution:

Resolved that the Secretary of this corporation, Morris Trieber, shall forthwith make application to the Commissioner of Corporations of the State of California for permission to issue capital stock of this corporation, as follows:

To I. E. Arian, for the transfer by him to his corporation of the business carried on and conducted by him at 1151 Mission Street, including generally U. S. merchandise, new and used clothing, camping equipment, hunting clothes, shoes and leg-gings, and general merchandise of all kinds, including fixtures and office equipment and the good will of said company now operated under the name of U. S. Army Surplus and I. E. Arian, one hundred (100) shares of the capital stock of this corporation of the par value of Ten Thousand Dollars (\$10,000), and to pay to him the sum of Twenty-five Hundred Dollars (\$2500), which sum has already been paid.

To Jerome R. Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the sum of Ten Thousand Dollars (\$10,000) in cash.

To Samuel Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the

transfer to this corporation of merchandise of the fair and reasonable value of \$6,708.10, and the payment in cash of \$3,291.82.

To Morris Trieber, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the transfer by him to this corporation of merchandise of the fair and reasonable value of \$8,967.10 and payment in addition thereto of cash in the sum of \$1,032.90."

VII.

That thereafter and on the 22nd day of March, 1951, under the authority and in line with the resolutions aforementioned, and in further reliance of the representation of defendant as aforementioned, the plaintiff corporation duly filed with the Department of Investments, Division of Corporations of the State of California, an application for a permit to sell and issue four hundred (400) shares of the capital stock of said corporation of the par value of Forty Thousand Dollars (\$40,000) to the persons named in the said resolution and upon the terms and conditions set forth in said resolution; that said application was executed by defendant Maurice Trieber on behalf of said corporation.

VIII.

That thereafter and on the 28th day of March, 1951, the Commissioner of Corporations of the State of California issued and delivered to the plaintiff corporation a Permit for the issuance and sale of

four hundred (400) shares of the capital stock of said corporation to I. E. Arian, Samuel Gayne, Jerome R. Gayne and Maurice Trieber for the considerations and on the conditions set forth in the Resolution, above referred to, and in the application filed by said corporation based upon said resolution; that said permit further provided that said stock shall be issued prior to September 28, 1951.

That said permit further provided that the corporation designate an escrow holder to be approved by the Commissioner of Corporations, which said escrow holder was to hold the stock to be issued to the persons above named until the further order of the Commissioner of Corporations. That no further order of the Commissioner of Corporations was thereafter made.

IX.

That on or about the 29th day of March, 1951, at a special meeting of the Board of Directors of plaintiff corporation, duly and regularly called and held, at which all directors were present, a resolution was adopted pursuant to the terms of the permit aforementioned, designating and selecting one Joseph A. Brown, an attorney at law and the attorney for said corporation, as the escrow holder for all of the stock to be issued by said corporation pursuant to the Permit aforementioned.

That thereafter and on or about April 4, 1951, the defendant Maurice Trieber, as secretary of said corporation, filed with the Division of Corporations,

Department of Investments, State of California, a certified copy of the said resolution selecting the said Joseph A. Brown as such escrow holder.

That thereafter and on the 6th day of April, 1951, the Commissioner of Corporations of the State of California issued his order approving the selection of the said Joseph A. Brown as escrow holder by the said corporation, which said escrow holder was to hold said stock to be issued to the persons above named until the further order of the Commissioner of Corporations and that no further orders have to date been issued.

X.

That thereafter and on or about the 30th day of April, 1951, said defendant Trieber represented to the directors and the officers of said plaintiff corporation that he had delivered to the said corporation the merchandise of the fair and reasonable value of \$15,675.28, that merchandise of the fair and reasonable value of \$6,708.18 was so delivered on behalf of Samuel Gayne and in part payment of the 100 shares of stock subscribed to by the said Samuel Gayne, and \$8,967.10 in merchandise of the fair and reasonable value of said sum in part payment of the 100 shares subscribed to by said defendant Maurice Trieber.

That in reliance upon the said representations of the defendant, Maurice Trieber, the said corporation on the 30th day of April, 1951, pursuant to the provisions of the Permit aforementioned, issued

four certificates, each for one hundred (100) shares of the capital stock of said corporation, each of the total par value of Ten Thousand Dollars (\$10,000.00), which said certificates were issued to the following named persons for the following considerations:

Certificate No. 1, to I. E. Arian for 100 shares of the capital stock of said corporation, of the par value of \$10,000.00 in consideration of the transfer to the said corporation of the merchandise and fixtures hereinabove referred to, which said merchandise and fixtures were so delivered to the said corporation by the said I. E. Arian.

Certificate No. 2, to Jerome R. Gayne for 100 shares of stock of the par value of \$10,000.00 in consideration of the payment to said corporation of \$10,000.00 in cash, which said sum of \$10,000.00 in cash was paid by the said Jerome R. Gayne.

Certificate No. 3, to Samuel Gayne for 100 shares of the capital stock of said corporation of the par value of \$10,000 in consideration of the delivery to the said corporation of merchandise of the fair and reasonable value of \$6,708.19 and the payment to the said corporation of \$3,291.82 in cash. That the said merchandise aforementioned to be delivered to said corporation by defendant Maurice Trieber was never delivered to the said corporation as herein in this complaint set forth, that the said \$3,291.82 in cash was paid to said corporation by the same Samuel Gayne.

Certificate No. 4, to Maurice Trieber in consideration of the delivery to the said corporation of merchandise of the fair and reasonable value of \$8,967.10 and the payment in cash of \$1,032.90; that the said merchandise was not delivered to said corporation as in this complaint set forth; that the said sum of \$1,032.90 was paid to said corporation by said Maurice Trieber.

That the said Certificates 1, 2, 3 and 4 aforementioned were by said corporation duly issued and delivered to the parties named in said certificates, by delivery thereof to the duly appointed and approved escrow holder, Joseph A. Brown, on behalf of said parties, and that said escrow holder on July 12, 1951, issued his receipt therefor and delivered a copy of said receipt setting forth that he holds said certificates for the parties to whom said certificates were issued, including the defendant, and filed a copy thereof with the Commissioner of Corporations of the State of California.

XI.

That the representations and offer of the said defendant Maurice Trieber herein set forth in Paragraph IV, subparagraph B thereof, were false, fraudulent and untrue in that at said time and place the defendant was not the owner and did not have in his possession general surplus merchandise of the type and character which said corporation was organized to sell or any merchandise of the fair and reasonable value of \$15,675.28 or of any sum whatsoever.

That the representations of the said defendant Maurice Trieber herein set forth in Paragraph V were false, fraudulent and untrue in that the merchandise therein offered to be delivered by the said Maurice Trieber did not then have merchandise to deliver to said corporation of the value of \$15,675.28 or merchandise of any value whatsoever.

That the representations of the said Maurice Trieber hereinabove set forth in Paragraph X were false, fraudulent and untrue in that the said defendant Trieber did not deliver to the said corporation merchandise of the fair and reasonable value of \$15,675.28 or any merchandise whatsoever of any value whatsoever and did not deliver to the said corporation merchandise of the fair and reasonable value of \$6,708.18 on behalf of Samuel Gayne or any merchandise of any value and that he did not deliver merchandise of the value of \$8,967.10 in part payment of the 100 shares subscribed to by him, the said defendant Trieber, or any merchandise of any value whatsoever.

XII.

That plaintiff was induced to sell, issue and deliver 200 shares of stock of said corporation, as aforementioned, to the defendant and to Samuel Gayne, by said false and fraudulent representations, and but for said false and fraudulent representations, would not have issued and delivered said shares of stock.

XIII.

That, excepting as herein set forth as to the payments of \$3,291.82 in cash by Samuel Gayne and \$1,037.90 in cash by defendant, Maurice Trieber, said 200 shares of stock were not paid for.

XIV.

That by reason of the defendant's fraud and misrepresentation as hereinabove set out, plaintiff has been damaged in the sum of \$15,675.28, plus interest at the rate of seven per cent (7%) on said sum from April 30, 1951, to date.

XV.

That in doing the things herein alleged, the defendant acted wilfully, maliciously and wantonly, and has been guilty of oppression, fraud and malice, and that said defendant's acts were in direct violation of Section 26104 of the Corporations Code of the State of California, Subdivisions (a), (b) and (f) thereof, in that said defendant knowingly aided in the issue or sale of or caused or assisted in causing to be issued, executed or sold, the stock of the plaintiff corporation in non-conformity with the permit of the Commissioner then in effect authorizing such issue or contrary to the provisions of the subdivisions as hereinabove set forth, in that in the application to the Commissioner of Corporations for the permit to issue and sell the stock of the plaintiff corporation, defendant knowingly made false statements or representations as hereinabove set forth with knowledge of their falsity

and with said knowledge of the falsity and of his own representations caused to be issued the stocks hereinabove mentioned to himself and to Samuel Gayne; and in that in violation of the permit issued by the Division of Corporations, the said defendant caused the stocks above mentioned to be issued to himself and Samuel Gayne without payment therefor as provided in the permit issued by the Division of Corporations as aforementioned. By reason of the foregoing defendant caused said corporation to issue false and fraudulent financial statements to creditors and banks, damaged and injured the credit standing of said corporation causing said corporation embarrassment and ridicule to the damage of the plaintiff corporation in the further sum of Ten Thousand Dollars (\$10,000.00) and by reason of the foregoing, plaintiff further demands exemplary and punitive damages against the defendant in the sum of Fifteen Thousand Dollars (\$15,000.00).

Wherefore, etc.

As and for a Second, Separate and Distinct Cause of Action Against Said Defendant, Plaintiff Alleges:

I.

Plaintiff incorporated herein by reference Paragraphs I, II, and III of plaintiff's first cause of action as part of this cause of action with the same force and effect as if the same were herein set forth word for word.

II.

That within two years last past in the City and County of San Francisco, State of California, and in the County of Marin, State of California, defendant above named became indebted to plaintiff as and for sums expended by plaintiff on behalf of defendant at defendant's specific instance and request, for cash advanced to defendant at defendant's specific instance and request, for sums paid to defendant by plaintiff on the representation of defendant that he had expended said sums for traveling and other expenses on behalf of plaintiff but which in truth and in fact were not so expended by the said defendant on behalf of the said plaintiff but if so expended were expended on his own behalf, in the following sums:

1. Sums paid for rent, utilities, etc., at
1140 Mission Street, San Francisco,
California.\$1,125.58
2. Sums paid on account of merchandise
not received by Gayne Sales Co., Inc.,
but received by Maurice Trieber..... 541.49
3. Sums advanced to Maurice Trieber by
Gayne Sales Co., Inc..... 406.55
4. Sums drawn by Maurice Trieber
charged an expense, but not expended
on behalf of the corporation..... 1,673.05

which sums total \$3,746.67, all of which said sum is due, owing and unpaid.

III.

That plaintiff has demanded the payment of said sum of \$3,746.67, that nothing has been paid on account thereof, and the whole thereof is due, owing and payable.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. For compensatory damages in the sum of \$29,421.95 plus interest at the legal rate from April 30, 1951, on \$15,675.28, and legal interest on the balance from the date of the respective advances making up said balance;

2. For exemplary damages in the sum of \$15,000.00; and

3. For such other and further relief as the Court may deem meet and proper in the premises and for costs of suit incurred herein.

/s/ MORRIS M. GRUPP,
Attorney for Plaintiff.

State of California,
City and County of San Francisco—ss.

Samuel Gayne being first duly sworn deposes and says:

That he is the President of the plaintiff corporation in the above-entitled action; that he has read the foregoing Second Amended Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters

therein stated on information and belief and as to those matters he believes it to be true.

/s/ SAMUEL GAYNE.

Subscribed and sworn to before me this 3 day of June, 1954.

[Seal] /s/ ANNA M. GRUPP,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission Expires April 3, 1955.

[Endorsed]: Filed June 4, 1954; Superior Court.

EXHIBIT "B"

MINUTE ORDER

Book 571; Page 472; Tuesday, August 3, 1954

[Title of Court and Cause.]

Heretofore submitted, ordered demurrer to second (2) amended complaint sustained as to first cause of action without leave to amend.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 20, 1955, U.S.D.C.

[Title of District Court and Cause.]

ORDER, JUDGMENT AND DECREE OVER-
RULING OBJECTION OF MORRIS TRIE-
BER TO BANKRUPTCY COURT'S JURIS-
DICTION TO HEAR TRUSTEE'S OBJEC-
TIONS TO CLAIM AND/OR PETITION
FOR TURN-OVER ORDER ON THE
MERITS

Whereas, it appears from the record herein and the court so finds, that at the time John O. England, as trustee of the estate of the above-named bankrupt, filed "Trustee's Objections to the Allowance of the Claim of Morris Trieber and Petition for Turn-Over Order," i.e., on June 20, 1955, said Morris Trieber voluntarily was before this bankruptcy court, seeking through a certain verified "Proof of Claim and Letter of Attorney" to have a claim in the sum of \$3162.24, allowed against the estate of the above-named bankrupt, said claim having been filed in the above-entitled bankruptcy proceeding on October 18, 1954, this bankruptcy court concludes, as a matter of law, that this bankruptcy court, since the filing of the trustees said objection and petition for turn-over order, on June 20, 1955, as aforesaid, has had, and now has, jurisdiction over said Morris Trieber and the subject matter referred to in the trustee's said objection and/or the trustee's said petition for turn-over order.

It hereby is ordered, adjudged and decreed:

1. That this bankruptcy court has jurisdiction over said Morris Trieber and said subject matter;

2. That the objection to jurisdiction of said Morris Trieber be, and said objection is, overruled;

3. That January 30, 1956, be, and said last mentioned date is, hereby fixed for the hearing on the merits of the trustee's said objection and/or the trustee's said petition for turn-over order, and that said hearing, on the merits, be held on said last mentioned date, commencing at the hour of 10:00 o'clock a.m., of said last mentioned day, at Room 609 Grant Building, 1095 Market Street, San Francisco, California, to be postponed and/or continued from time to time thereafter as the circumstances shall warrant.

Dated: January 10th, 1956.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed January 10, 1956.

[Title of District Court and Cause.]

PETITION OF MORRIS TRIEBER FOR RE-
VIEW OF ORDER OF REFEREE BY A
JUDGE

To the Honorable Judges of the United States District Court for the Northern District of California:

Now comes Morris Trieber, a person aggrieved by an order of Honorable Burton J. Wyman, Referee in Bankruptcy, of this Honorable Court, and

within ten days after the entry of said order, files with the said Referee, this, his petition for review by a Judge of this Honorable Court of that certain order filed and entered the 10th day of January, 1956, by the said Referee and entitled "Order, Judgment and Decree Overruling Objection of Morris Trieber to Bankruptcy Court's Jurisdiction to Hear Trustee's Objections to Claim and/or Petition for Turn-Over Order of the Merits, which said order, omitting the caption and the title thereof, was and is in the words and figures following, to wit:

"Whereas, it appears from the record herein and the court so finds, that at the time John O. England, as trustee of the estate of the above-named bankrupt, filed 'Trustee's Objections to the Allowance of the Claim of Morris Trieber and Petition for Turn-Over Order,' i.e., on June 20, 1955, said Morris Trieber voluntarily was before this bankruptcy court, seeking through a certain verified 'Proof of Claim and Letter of Attorney' to have a claim in the sum of \$3,162.24, allowed **against the** estate of the above-named bankrupt, said claim having been filed in the above-entitled bankruptcy proceeding on October 18, 1954, this bankruptcy court concludes, as a matter of law, that this bankruptcy court, since the filing of the trustees said objection and petition for turn-over order, on June 20, 1955, as aforesaid, has had, and now has, jurisdiction over said Morris Trieber and the subject matter referred to in the trustee's said objection and/or the trustee's said petition for turn-over order,

“It hereby is ordered, adjudged and decreed:

“1. That this bankruptcy court has jurisdiction over said Morris Trieber and said subject matter;

“2. That the objection to jurisdiction of said Morris Trieber be, and said objection is, overruled;

“3. That January 30, 1956, be, and said last mentioned date is, hereby fixed for the hearing on the merits of the trustee's said objection and/or the trustee's said petition for turn-over order, and that said hearing, on the merits, be held on said last mentioned date, commencing at the hour of 10:00 o'clock a.m., of said last mentioned day, at Room 609 Grant Building, 1095 Market Street, San Francisco, California, to be postponed and/or continued from time to time thereafter as the circumstances shall warrant.

“Dated: January 10th, 1956.

“BURTON J. WYMAN,

“Referee in Bankruptcy.”

That the alleged errors in respect to the said order are as follows, to wit:

I.

That this Honorable Court has not, nor has the said Referee in Bankruptcy, any jurisdiction to hear or determine the petition of the Trustee in Bankruptcy or to hear or determine the order to show cause issued by the said Referee on or about the 20th day of June, 1955, for the reason that the

said proceeding before the said Referee in which the order sought to be removed was made presented a case of a contest between the Trustee in Bankruptcy and the said Morris Trieber, who was not a party to the said bankruptcy proceedings, and whose rights, claims and defense could not and cannot be summarily adjudicated by the said Referee or by this Honorable Court in such proceeding;

II.

That the petition of said Referee in Bankruptcy, to which the said Referee has overruled the objections of the said Morris Trieber in the order hereinabove set forth, sets forth a purported claim against the said Morris Trieber for damages alleged to have been suffered by the said bankrupt by reason of alleged fraudulent and wilful misrepresentations alleged to have been made by said Morris Trieber and that it is further alleged in the said petition of the said Trustee that the said bankrupt corporation suffered additional damages in the sum of \$10,000.00; and it is further alleged that the said corporation demands exemplary and punitive damages against the said Morris Trieber in the sum of \$15,000.00; and the said Trustee in the prayer of said petition prayed for an order that the said Morris Trieber pay and turn over to said Trustee the sum of \$40,675.28 together with interest at legal rate in the sum of \$15,675.28 from April 30, 1951, forward;

III.

And your petitioner further shows to Your Honors that neither this Honorable Court nor the

said Referee has or had any jurisdiction to make any such order; that such an order or judgment could be made only upon a trial before a court of competent jurisdiction, and after verdict of a jury duly impaneled and sworn to try the cause, or upon findings made by the court in such cause, if trial by jury were waived;

IV.

And in this behalf the said Morris Trieber further represents and shows to Your Honors that neither the said Referee in Bankruptcy nor any judge of this Honorable Court had or has or would in any event have any jurisdiction of any action brought by the said Trustee in Bankruptcy to recover said sum or any other sum of money claimed to be due from said Morris Trieber to said bankrupt, or to the trustee of said bankrupt by reason of any alleged fraud or by reason of any other matters or things whatsoever, for the reason that there is no diversity of citizenship between the parties, and the jurisdiction of any such action is in the jurisdiction of the courts of the State of California, whose jurisdiction cannot be ousted by any order that might be made by the said Referee or by this Honorable Court itself;

V.

And as further ground for review of the said order of the said Referee, your petitioner, said Morris Trieber, respectfully shows and represents to Your Honors that, all and singular, the matters and things set forth by the said Trustee in Bank-

ruptcy as grounds for the order and relief sought herein by the said Trustee, and, all and singular, the claims of the said Trustee therein set forth cannot be maintained by said Trustee in this proceeding for the reason that the said Trustee is barred and precluded from maintaining the same by virtue of a said judgment and order heretofore, to wit, on the 3rd day of August, 1954, duly given, made and entered in and by the Superior Court of the State of California in and for the City and County of San Francisco, and numbered therein 431,888, in which Gaynes Sales Co., Inc., a corporation, the bankrupt in this proceeding, was plaintiff, and the said Morris Trieber was defendant, in which a certain second amended complaint for damages for fraud, breach of contract and money had and received was sustained by said Superior Court without leave to amend; that the said second amended complaint was based upon the same purported cause of action and involved in all respects the said matters and things and all and singular the same claims as are set forth in the present proceeding before the said Referee in Bankruptcy, all of which, from the said second amended complaint in the action last aforesaid and from the minute order of said Superior Court sustaining the demurrer of the said Morris Trieber to the said complaint of said Gayne Sales Co., Inc., a corporation, without leave to amend, and which are set forth in the answer and return of Morris Trieber to the order to show cause issued by the said Referee in Bankruptcy, fully and at large appears;

VI.

And in this behalf, the said Morris Trieber further shows, as an error in respect to the said order of said Referee sought to be reviewed, that thereafter and on the 11th day of August, 1954, the said Gayne Sales Co., Inc., appealed from the order of said Superior Court to the Supreme Court of the State of California from the order of the said Superior Court sustaining the demurrer of the said Morris Trieber to the second amended complaint of Gayne Sales Co., a corporation. the bankrupt herein, without leave to amend; and the said Morris Trieber further shows that thereafter, and prior to the first day of December, 1954, the said Supreme Court of the State of California, in the exercise of the jurisdiction conferred upon it by the Constitution of the State of California, duly transferred the said appeal to the District Court of Appeals of the State of California in and for the First Appellate District, Division Two, and that on the first day of December, 1954, the said Gayne Sales Co., Inc., a corporation, filed in said District Court of Appeals a certain brief, in which the said corporation sets forth in substance and effect all of the matters and things now set forth in the present proceeding before the said Referee in Bankruptcy: that thereafter and on the 20th day of December, 1954, the said Morris Trieber filed in the said District Court of Appeals a notice of motion to dismiss the said appeal of the said Gayne Sales Co., Inc., from the said order sustaining the said demurrer to the second amended complaint without

leave to amend, and filed therewith a Memorandum of Points and Authorities in support of the said motion;

That thereafter and on the 10th day of January, 1955, the said motion to dismiss the said appeal from the said order of said Superior Court, came on regularly to be heard before the said District Court of Appeals and was argued by counsel; in consideration whereof it was by the said District Court of Appeals, ordered, adjudged and decreed that the said motion be granted and that said appeal of the said Gayne Sales Co., Inc., be dismissed; and that by reason of all and singular the premises, the said judgment in the aforesaid action of Gayne Sales Co., Inc., v. Morris Trieber, is *res judicata* as to all and singular the matters before said Referee and before this Honorable Court in the instant cause, and the said Gayne Sales Co., Inc., and its said Trustee in Bankruptcy are, and each of them is, estopped and concluded from seeking the order prayed for herein and from obtaining any of the relief sought by them, or by either of them; and said Referee and this Honorable Court are likewise estopped and precluded from granting any relief in the premises to the said bankrupt or to the said Trustee in Bankruptcy;

VII.

That the purported cause of action set forth in the petition of the said Trustee in Bankruptcy against the said Morris Trieber is barred by the

statute of limitations of the State of California, as set forth in subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California, by reason whereof the said Referee has no jurisdiction to hear or determine the petition of the said Trustee for a turn-over order on the merits or otherwise.

Wherefore, your petitioner, the said Morris Trieber, respectfully prays that the aforesaid order of said Referee in Bankruptcy may be reviewed by one of Your Honors and that upon said review it be ordered, adjudged and decreed that the aforesaid petition of said Trustee in Bankruptcy be dismissed and the order to show cause discharged, and for such other and further relief as to Your Honors shall seem meet, just and proper in the premises.

Dated: January 12, 1956.

/s/ JOSEPH A. BROWN,
Attorney for Petitioner.

[Endorsed]: Filed January 13, 1956.

[Title of District Court and Cause.]

ORDER

After the Gayne Sales Company had been adjudged a bankrupt, one Morris Trieber filed his proof of claim for a debt assertedly due him from the bankrupt. The Trustee of the bankrupt filed his written objections to the allowance of this claim and at the same time filed a petition for a turn-over

order. The Referee issued an order to show cause which was served upon Trieber. Thereafter, Trieber filed a written withdrawal of his claim, and then filed an answer and return to the show cause order and moved to dismiss the petition of the Trustee on the grounds that the Referee had no jurisdiction to hear any of the matters set forth in that petition. The matter of Trieber's objection to the Referee's jurisdiction was briefed, and on January 10, 1956, the Referee issued an order overruling Trieber's objections to his jurisdiction and setting a time for a hearing on the merits of the Trustee's petition. Trieber filed a petition for review of this order by a judge of this Court, and the Trustee moved to dismiss the petition for review and to remand the cause to the Referee for a hearing on the merits.

It appears that the order of the Referee involved here was interlocutory and not final, and that therefore this Court should not review the order. See *Collier on Bankruptcy* §39.21. Accordingly, the petition for review is hereby dismissed and the cause is remanded to the Referee for a hearing on the merits, reserving to the petitioner all his objections to the jurisdiction of the Referee.

Dated: April 11, 1956.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed April 12, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Morris Trieber hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment, order or decree heretofore, to wit, on the 12th day of April, 1956, given, made and entered in and by the United States District Court for the Northern District of California, Southern Division, which, omitting the caption thereof, was and is in the words and figures following, to wit:

“After the Gayne Sales Company had been adjudged a bankrupt, one Morris Trieber filed his proof of claim for a debt assertedly due him from the bankrupt. The Trustee of the bankrupt filed his written objections to the allowance of this claim and at the same time filed a petition for a turnover order. The Referee issued an order to show cause which was served upon Trieber. Thereafter, Trieber filed a written withdrawal of his claim, and then filed an answer and return to the show cause order and moved to dismiss the petition of the Trustee on the grounds that the Referee had no jurisdiction to hear any of the matters set forth in that petition. The matter of Trieber’s objection to the Referee’s jurisdiction was briefed, and on January 10, 1956, the Referee issued an order overruling Trieber’s objections to his jurisdiction and setting a time for a hearing on the merits of the Trustee’s petition. Trieber filed a petition for re-

view of this order by a judge of this Court, and the Trustee moved to dismiss the petition for review and to remand the cause to the Referee for a hearing on the merits.

“It appears that the order of the Referee involved here was interlocutory and not final, and that therefore this Court should not review the order. See Collier on Bankruptcy §39.21. Accordingly, the petition for review is hereby dismissed and the cause is remanded to the Referee for a hearing on the merits, reserving to the petitioner all his objections to the jurisdiction of the Referee.

“Dated: April, 1956.

“/s/ O. D. HAMLIN,
“United States District
Judge.”

Dated: April 16, 1956.

/s/ JOSEPH A. BROWN,
Attorney for Appellant
Morris Trieber.

Receipt of copy acknowledged.

[Endorsed]: Filed April 17, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON
APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Cali-

fornia, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorney for the Appellant:

Order of Adjudication and Reference.

Proof of Claim, Morris Trieber.

Trustee's Objections to the Allowance of the Claim of Morris Trieber and Petition.

Order to Show Cause.

Answer and Return of Morris Trieber for Want of Jurisdiction.

Order of Referee filed January 10, 1956.

Petition of Morris Trieber for Review of Order of Referee.

Order.

Notice of Appeal.

Cost Bond on Appeal.

Designation of Contents.

In witness whereof, I have hereunto set my hand and affixed seal of said District Court, this 17th day of May, 1956.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15134. United States Court of Appeals for the Ninth Circuit. Morris Trieber, Appellant, vs. John O. England, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a Corporation, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: May 17, 1956.

Docketed: May 22, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15134

In the Matter of:

GAYNE SALES CO., INC.,
a California Corporation,

Bankrupt.

STATEMENT OF POINTS

Now comes Morris Trieber, who has on April 17, 1956, appealed to the United States Court of Appeals for the Ninth Circuit from the order of the said District Court given and made the 12th day of April, 1956, dismissing the petition of said Morris Trieber for a review by the said District Court of an order of the Referee in Bankruptcy, as from the notice of appeal to the said United States Court of Appeals for the Ninth Circuit fully and at large appears; and, pursuant to the provisions of Subdivision d of Rule 75 of the Federal Rules of Civil Procedure, designates the points on which said Morris Trieber intends to rely on said appeal:

1. Purported claim for affirmative relief by the trustee is barred by the Statute of Limitations;

2. The proceedings by the Trustee are barred by the final judgment of the State Court in an action between the bankrupt and Trieber, which was an action between the same parties for the same cause.

3. The principle of *res judicata* applies to a judgment based upon the sustaining of a demurrer.

4. Neither the Referee in Bankruptcy nor the District Court had any jurisdiction to make the order sought by the Trustee or to hear or determine the Trustee's claim for damages or to make the "turnover" order prayed for by the Trustee.

5. The District Court erred in holding that the order of the Referee was interlocutory and could not be reviewed.

6. The District Court erred in dismissing the petition of Morris Trieber for review and in remanding the cause to the Referee for a hearing on the merits.

Dated: June 4th, 1956.

/s/ JOSEPH A. BROWN,
Attorney for Appellant
Morris Trieber.

[Endorsed]: Filed June 5, 1956.

No. 15,134

IN THE

United States Court of Appeals
For the Ninth Circuit

MORRIS TRIEBER,

Appellant,

VS.

JOHN O. ENGLAND, Trustee in Bank-
ruptcy of the Estate of Gayne Sales
Co., Inc., a Corporation, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

JOSEPH A. BROWN,

DeYoung Building, San Francisco 4, California,

Attorney for Appellant.

FILE

AUG 14 1957

PAUL P. O'BRIEN, C



Subject Index

	Page
Jurisdictional statement	2
Abstract of the case presenting succinctly the questions involved and the manner in which they are raised	3
Specification of errors relied upon	21
Argument of the case	21
Summary of the argument	21

I.

The appellate jurisdiction of this court in bankruptcy proceedings includes interlocutory as well as final orders ...	22
---	----

II.

Neither the referee nor the District Court in bankruptcy has any jurisdiction to make the order sought by the trustee, or to hear or determine his claim for damages or, more particularly, to make the "turnover" order prayed for	34
1. A court of bankruptcy has no jurisdiction to try a controversy between the trustee and one not a party to the proceeding; and even the District Court may not, in the exercise of its law or equity jurisdiction, hear and determine such a suit in the absence of diversity of citizenship	34
2. Neither the referee nor the District Court has any jurisdiction to make the "turnover" order sought by the trustee	37

III.

The purported claim for affirmative relief by the trustee is barred by the statute of limitations	44
---	----

IV.

The proceedings by the trustee are barred by the final judgment of the state court in an action between the bankrupt and Trieber which was an action between the same parties for the same cause	47
Conclusion	51

Table of Authorities Cited

Cases	Pages
Arkansas Corp. Commission v. Thompson, 116 Fed. 2d 179, reversed on other grounds, 313 U.S. 132, 85 L. Ed. 1244, 61 S. Ct. 888	26, 31
Chandler v. Perry, 74 Fed. 2d 371	39
Cline v. Kaplan, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed. 97...	41
Cohen v. Eleven West 42d Street, Inc., 115 Fed. 2d 531....	32
Columbia Foundry Co. v. Lochner, 179 Fed. 2d 630, 14 A.L.R. 2d 1349	26, 32
Cragge v. White, 113 C.A. 2d 356, 248 Pac. 2d 193	46
Crowley v. Modern Faucet Manufacturing Co., 44 Cal. 2d 321, 282 Pac. 2d 33	51
Daniel v. Guaranty Trust Co. of New York, 285 U.S. 154, 52 S. Ct. 326, 78 L. Ed. 675	38
Delatour v. Meredith, 144 Fed. 2d 594	27
Dwyer v. Franklin, 227 Fed. 2d 152	43
Erganian v. Brightman, 13 Cal. App. 2d 696, 57 Pac. 2d 971	50
Federal Land Bank v. Hansen, 113 Fed. 2d 82	27, 29
Freeze v. Salot, 122 Cal. App. 2d 561, 266 Pac. 2d 140....	50
Galbraith v. Vallely, 256 U.S. 46, 41 S. Ct. 415, 65 L. Ed. 823	41
Galusha v. Fraser, 178 Cal. 653	49
Gibson v. Rath, 13 C.A. 2d 40, 55 Pac. 2d 1219	46
Goldie v. Carr, 116 Fed. 2d 325	30
Goodard v. Security Title Insurance and Guarantee Co., 14 Cal. 2d 47	50
Harris v. First National Bank, 216 U.S. 382, 30 S. Ct. 296, 54 L. Ed. 528	35
Harris v. Mills Novelty Co., 106 Fed. 2d 976	25
Hoehn v. McIntosh, 110 Fed. 2d 199	27
In re Cox-Rackley Co., 245 Fed. 367.....	39, 42
In re Federal Photo Engraving Corp., 54 Fed. 2d 628	31

TABLE OF AUTHORITIES CITED

iii

Pages

In re Leigh, 139 Fed. 2d 386	27, 28
In re Luma Camera Service, 157 Fed. 2d 951	41
In re Rathman, 183 Fed. 913	42
Jackson v. Master Holding Corp., 16 Cal. 2d 824, 108 Pac. 2d 673	46
Kaigler v. Gibson, 264 Fed. 240	35
Keidatz v. Albany, 39 Cal. 2d 826, 249 Pac. 2d 264	49
Kelso v. Maclaren, 122 Fed. 2d 867	26
Lady Washington Consolidated Gold Mining Co. v. Wood, 113 Cal. 482, 45 Pac. 809	45, 49
Lewis v. Security-First National Bank of Los Angeles, 58 C.A. 2d 827, 137 Pac. 2d 864	46
Lieberman v. Bancroft, 59 Fed. 2d 202	31
Lovell v. Newman, 227 U.S. 412, 33 S. Ct. 375	36
Maggio v. Zeitz, 333 U.S. 56, 68 S. Ct. 401, 92 L. Ed. 476	40
Morris Plan Industrial Bank v. Schorn, 135 Fed. 2d 538....	28
Mortimer v. Loynes, 74 C.A. 2d 160	49
Original Mining and Milling Co. v. Casad, 210 Cal. 71	49
Pearson v. Higgins, 34 Fed. 2d 27	30, 31
Re Bush Terminal Co., 105 Fed. 2d 150	25
Re Chicago & E. I. R. Co., 121 Fed. 2d 785, certiorari denied, 314 U.S. 653, 86 L. Ed. 523, 62 S. Ct. 102	26
Re Winton Shirt Corp., 104 Fed. 2d 777	26
Robertson v. Berger, 102 Fed. 2d 530	25
Robinson v. Howard, 5 Cal. 429	49
R. J. Rosen & Sons, Inc., 130 Fed. 2d 81	27
Sacramento Suburban Fruit Lands Co. v. Lindquist, 39 Fed. 2d 900 (certiorari denied by the Supreme Court of the United States, 282 U.S. 853, 51 S. Ct. 31, 75 L. Ed. 756)	46
Seeger v. Odell, 18 Cal. 2d 409, 115 Pac. 2d 977, 136 A.L.R. 1291	46
Sides v. Sides, 119 C.A. 2d 349, 259 Pac. 2d 708	46
State Trust & Savings Bank v. Dunne, 278 U.S. 582, 73 L. Ed. 518, 49 S. Ct. 184	36

	Pages
Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 68 L. Ed. 770, 44 S. Ct. Rep. 396	41
Theard v. Fidelity & Deposit Co., 202 Fed. 2d 880	25
Vertex Investment Company v. Schwabacher, 57 C.A. 2d 406, 134 Pac. 2d 891	46
Watkins v. Bryant, 91 Cal. 492, 27 Pac. 775	45
Weidhorn v. Levy, 253 U.S. 268, 40 S. Ct. 534	35
West v. Great Western Power Co., 36 C.A. 2d 403, 97 Pac. 2d 1014	46
Wilmans v. Weissman, 38 C.A. 693, 102 Pac. 2d 382	46

Statutes

Bankruptcy Act:

Section 21(a) (11 U.S.C. Sec. 44(a))	25, 26
Section 24 (11 U.S.C. Sec. 47, amended 1938)	24
Section 75 (11 U.S.C. Sec. 203)	27

California Code of Civil Procedure:

Section 338, Subdivision 4	20
----------------------------------	----

United States Code:

Title 11, Section 47	2, 22
Title 11, Section 47(a)	30, 31
Title 28, Section 1334	2

Texts

8 Remington "Appealable Orders; in General" page 323..	24
--	----

No. 15,134

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MORRIS TRIEBER,

Appellant,

VS.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a Corporation, Bankrupt,
Appellee.

APPELLANT'S OPENING BRIEF.

On petition of the appellee, the Referee in Bankruptcy at San Francisco in the Northern District of California issued an order directed to the appellant requiring him to show cause why he should not be required to pay to the appellee, as trustee of the estate of the said bankrupt, the sum of \$40,675.28 as compensatory and punitive damages for alleged fraud upon the bankrupt corporation.

For answer and return to the said order, the appellant moved to dismiss the petition and to discharge the order to show cause for want of jurisdiction. The Referee made what was styled "An Order, Judgment

and Decree'' overruling appellant's objection to his jurisdiction to make the turnover order. Appellant petitioned the District Court for a review of the Referee's order, which petition was denied by the District Court upon the ground that the order was interlocutory and not final. (TR 52.) This appeal is from the said order of the District Court.

JURISDICTIONAL STATEMENT.

The statutory provisions which sustain the jurisdiction are as follows:

1. The jurisdiction of the District Court, Title 28, Sec. 1334, United States Code:

“The District Court shall have original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy.”

2. The jurisdiction of this Court upon appeal to review the order in question: Title 11, Section 47, United States Code:

“Jurisdiction of Appellate Courts:

“(a) The United States Courts of Appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy to review, affirm, revise or reverse, both in matters of law and in matters of fact.”

3. The pleadings necessary to show the existence of jurisdiction.

(a) The proof of claim of appellant. (TR 4.)

(b) Trustee's objections to the allowance of claim of Morris Trieber and petition for turnover order. (TR 8.)

(c) Answer and return of Morris Trieber to order to show cause and motion to dismiss petition of Trustee and to discharge order to show cause for want of jurisdiction. (TR 20.)

(d) Petition of Morris Trieber for review of order of Referee by a Judge. (TR 44.)

4. The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction to review the judgment, decree, or order in question.

These facts are set forth succinctly in the introductory paragraph of this brief and will be stated more fully in the ensuing abstract of the case. Accordingly, in the interest of brevity, and to avoid repetition, statement thereof is here omitted.

**ABSTRACT OF THE CASE PRESENTING SUCCINCTLY THE
QUESTIONS INVOLVED AND THE MANNER IN WHICH
THEY ARE RAISED.**

Gayne Sales Co., Inc., a California Corporation, was adjudicated a bankrupt on August 24, 1954, and the proceeding was referred to the Referee in Bankruptcy. (TR 3.)

On October 15, 1954, Morris Trieber filed a proof of claim, setting forth that the bankrupt corporation was at the time of the filing of its petition and theretofore justly indebted to him in the sum of \$3162.24, itemized as follows:

For salary for services performed for the corporation pursuant to an oral agreement, \$1600.00; for money paid by claimant on a note owing by the bankrupt, which note claimant had guaranteed, and on which note claimant paid, \$750.00; for goods, wares and merchandise sold and delivered to the bankrupt, \$382.65; paid by claimant on behalf of bankrupt on a judgment rendered against the bankrupt, which judgment this claimant guarantees, \$408.89; total \$3141.54. (TR 4.)

It was further alleged that no part of the debt or liability had been paid.

On June 20, 1955, the trustee filed a document entitled, "Trustee's Objections to the Allowance of the Claim of Morris Trieber and Petition for Turnover Order." (TR 8.)

This pleading, after denying the indebtedness, sets forth what is denominated: "A further, separate and distinct defense to the allowance of said claim, and as grounds for further relief." This contains the following allegations:

"That from the inception of the said incorporation and during all of the times mentioned herein, the said Morris Trieber was one of the incorporators of the said corporation, and together with I. E. Arian, Jerome R. Gayne and Samuel Gayne,

was during all of the times herein referred to, a director of said corporation, and that the said Morris Trieber was at all times herein referred to an officer of said corporation, to wit, the secretary thereof.

“That heretofore and on or about the 8th day of March, 1951, at a meeting of the Board of Directors of said corporation, at which all of the directors aforementioned were present, and at which meeting the said Morris Trieber was present as director and as secretary of the said corporation, the said corporation adopted the following resolution (TR 10):

“ ‘Resolved, that the Secretary of this corporation, Morris Trieber, shall forthwith make application to the Commissioner of Corporations of the State of California for permission to issue capital stock of this corporation, as follows:

“ ‘To I. E. Arian, for the transfer by him to this corporation of the business carried on and conducted by him at 1151 Mission Street, including generally U. S. merchandise, new and used clothing, camping equipment, hunting clothes, shoes and leggings, and general merchandise of all kinds, including fixtures and office equipment and the good will of said company now operated under the name of U. S. Army Surplus and I. E. Arian, one hundred (100) shares of the capital stock of this corporation of the par value of Ten Thousand Dollars (\$10,000.00), and to pay to him the sum of Twenty-five Hundred Dollars (\$2500), which sum has already been paid.

“ ‘To Jerome R. Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000)

par value, for the sum of Ten Thousand Dollars (\$10,000) in cash.

“ ‘To Samuel Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the transfer to this corporation of merchandise of the fair and reasonable value of \$6,708.18, and the payment in cash of \$3,291.82.

“ ‘To Morris Trieber, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the transfer by him to this corporation of merchandise of the fair and reasonable value of \$8,967.10 and payment in addition thereto of cash in the sum of \$1,032.90.’ (TR 11.)

“That said resolution was adopted upon the reliance of said Board of Directors upon the representations of the said Morris Trieber at that said meeting that he, the said Trieber, owned surplus merchandise of the kind and character which said corporation was organized to sell of the fair and reasonable market value of \$15,675.28; that he, the said Morris Trieber, was indebted to Samuel Gayne, one of the directors of the said corporation, in the sum of \$6,708.18; that he, the said Trieber, and Samuel Gayne had agreed between themselves that said indebtedness of Trieber to Gayne was to be paid by the said Trieber delivering to the said corporation on behalf of Gayne, merchandise of the reasonable value of \$6,708.18 in partial payment of stock to be issued to Samuel Gayne by the said corporation upon approval by the Department of Investment, Division of Corporations of the State of California and that he, the said Trieber, would

in consideration of the said Samuel Gayne, I. E. Arian and Jerome Gayne, subscribing for \$10,000 worth of stock to be paid for as follows:

“By I. E. Arian, by merchandise of the reasonable value of his \$10,000.00 subscription;

“By Jerome Gayne, by the payment of cash for his \$10,000.00 worth of stock;

“By Samuel Gayne, by the payment by Trieber in his behalf of merchandise of the value of \$6,708.18, and cash in the sum of \$3,291.82.

“That he, Trieber, would deliver to said corporation, in payment of his subscription, merchandise of the reasonable value of \$8,967.10 and cash in the sum of \$1,032.90.

“That said directors, relying upon said representations, and believing the same to be true, did adopt the resolution aforementioned. (TR 12.)

“That thereafter and on or about the 22nd day of March, 1951, in line with said resolution, and with the full knowledge and consent of the said Trieber, and believing the representations aforementioned of the said Trieber, and in reliance thereon, the officers and directors of said corporation filed an Application for Permit to Sell and Issue Stock, to wit, one hundred (100) shares to each of the persons heretofore named, for Ten Thousand Dollars (\$10,000.00), which said stock was paid for as set forth in said resolution aforementioned.

“That thereafter and on the 28th day of March, 1951, the Commissioner of Corporations, State of California, issued a permit for the issuance and the sale of four hundred (400) shares of stock to the said persons named, for the consideration set

forth in the resolution aforementioned; that said permit further provided that the stock shall be issued by the 28th day of September, 1951; that said permit further required the appointment of an escrow holder to be approved by the said Commissioner, which escrow holder was to hold the stock issued to the persons aforementioned until the further order of the said Commissioner of Corporations; that no further order of the said Commissioner of Corporations was thereafter made. (TR 13.)

“That thereafter the directors of said corporation, with the full knowledge and consent of the said Morris Trieber, and in reliance on the said representations of the said Trieber, and with the approval of the Commissioner of Corporations, named and designated one Joseph A. Brown, an attorney at law, as said escrow holder; that the resolution appointing the said Joseph A. Brown as said escrow holder was adopted at a special meeting duly and regularly held on the 29th day of March, 1951, and a certified copy thereof was duly filed with the Division of Corporations by the said Morris Trieber as secretary on the 4th day of April, 1951, and said escrow holder was approved by the Commissioner of Corporations on the 6th day of April, 1951.

“That thereafter the said Morris Trieber, on or about the 30th day of April, 1951, represented to the directors and officers of said corporation that he had delivered to the said corporation merchandise of the reasonable value of \$15,675.28, being the merchandise hereinabove referred to and delivered to said corporation in payment of stock, as follows:

“\$6,708.18 against the stock to be issued to Samuel Gayne;

“\$8,967.10, in payment of the stock to be issued to Morris Trieber.

“That in reliance upon the said representations of the said Trieber, so made on or about April 30, 1951, and believing the same to be true, the said corporation, on the said 30th day of April, 1951, pursuant to the Permit aforementioned, issued one hundred (100) shares of stock to each of the following named persons, for which stock said persons paid, or in the instance of Morris Trieber and Samuel Gayne, allegedly paid, the consideration therefor (TR 14):

“I. E. Arian, 100 shares of the par value of \$100.00 each, \$10,000.00 paid for by the said I. E. Arian in merchandise of the reasonable value of \$10,000;

“Jerome R. Gayne, 100 shares of the par value of \$100.00 each, for \$10,000.00 cash;

“Samuel Gayne, 100 shares of the par value of \$100.00 each, in consideration of the alleged delivery to the said corporation in his behalf of merchandise of the reasonable value of \$6,708.18, as represented to said corporation by the said Morris Trieber, was delivered by him to said corporation, and cash in the sum of \$3,291.82;

“Morris Trieber, 100 shares of the par value of \$100.00 each, in consideration of the alleged delivery to said corporation of merchandise of the reasonable value of \$8,967.10, as was represented by said Trieber, was by him delivered to said corporation, and cash in the sum of \$1,032.90.

“That certificates numbered 1, 2, 3 and 4, respectively, were issued to said parties and delivered to the escrow holder on the 12th day of July, 1951, on behalf of said parties respectively, which escrow holder in turn issued a receipt to each of said parties for his said shares, setting forth that he held said certificates for the said parties, and filed a copy thereof with the Commissioner of Corporations of the State of California. (TR 15.)

“That thereafter and within three years last past, the officers and directors of said corporation, other than the said Trieber, for the first time discovered that the representations of the said Trieber made to the said corporate officers and directors as above alleged on or about the 8th day of March, 1951, were false and untrue and were known by the said Morris Trieber to be false and untrue, and discovered that said Trieber did not own or control any surplus or other property which was of the value of \$15,675.28, or of any value whatsoever, that but for said false and untrue representations, said directors would not have adopted the said resolution so adopted on said day, nor would they have taken the further steps hereinabove outlined as having been taken, before the Division of Corporations of the State of California; that within the three years last past, the said officers and directors of said corporation, for the first time, discovered that the representations of the said Morris Trieber made to the officers and directors of said corporation on or about the 30th day of April, 1951, to the effect that he had delivered to the said corporation merchandise of the fair and reasonable value of \$15,675.28 in partial payment of the stock as

hereinabove alleged, for which stock was issued to him and Samuel Gayne, were in each and every instance false, fraudulent and untrue, and that the said Morris Trieber did not deliver any merchandise to the said corporation of any value whatsoever, either in payment of any stock issued to him, or in payment of the stock issued to the said Samuel Gayne as aforementioned, and that the said Morris Trieber falsely (TR 16), fraudulently and wilfully misrepresented to the said corporation the delivery of said merchandise. That the said officers and directors of the said corporation believed said representations to be true and relied thereon, and but for said relief and reliance, would not have issued the stock hereinabove referred to to the said Morris Trieber and/or Samuel Gayne.

“That by reason of the said Morris Trieber’s false, fraudulent and wilful misrepresentations as hereinabove set forth, and the reliance thereon by the said corporation’s directors and officers, the said corporation and the creditors of said corporation have been damaged in the sum of \$15,975.28, plus interest at the rate of seven per cent (7%) per annum on said sum from the 7th day of April, 1951, to date.

“That in doing the things herein alleged, the said Trieber acted wilfully, maliciously and wantonly and has been guilty of oppression, fraud and malice and the said Trieber’s acts were in direct violation of the Rules and Regulations and Laws applicable to the sale of corporate stock and the payment therefor, and by reason thereof caused said corporation embarrassment, caused said corporation to issue false and fraudulent statements

to creditors and bank, to the further damage of the said corporation in the sum of \$10,000.00, and by reason of the foregoing, the said corporation demands (TR 17) exemplary and punitive damages against the said Morrie Trieber in the sum of \$15,000.00.

“Wherefore, said Trustee prays that an Order be made and entered disallowing the claim of the said Morrie Trieber in the sum of \$3,162.24, and the whole thereof, and that no allowance be made for any sum whatsoever on said claim, and for an Order disallowing said claim unless and until said claimant pays to said Trustee the sum of \$40,675.28, together with interest at legal rate of \$15,675.28 from April 30, 1951, forward, and that said claimant be ordered to pay said sum to the Trustee herein, together with said Trustee’s costs incurred herein, and for such further and different Order as may be just and proper in the premises.” (TR 18.)

On the same day the referee issued an order that appellant appear before him on July 7, 1955 to show cause “why the relief prayed for by the trustee in said objections to the allowance of the claim of Morris Trieber should not be granted. (TR 19.)

On July 20, 1954, the appellant filed a document entitled, “Answer and return of Morris Trieber to order to show cause and motion to dismiss petition of trustee and to discharge order to show cause for want of jurisdiction.” The grounds of motion to dismiss the order to show cause for want of jurisdiction are thus stated in the said answer and return (TR 20):

“I.

“That this Honorable Court has not, nor has your Honor as Referee in bankruptcy of said Honorable Court any jurisdiction to hear or determine the petition of said Referee which is annexed to the said order to show cause, or to make any order thereon or to grant any of the relief prayed for by the said Trustee; and in this behalf the said Morris Trieber further shows to your Honor that this proceeding presents a case of a contest between the Trustee in bankruptcy and a third person who is not a party to the bankruptcy proceeding and whose rights, claims and defense cannot be summarily adjudicated by your Honor or by this Honorable Court in this proceeding; and that it further appears that the aforesaid petition of said referee in bankruptcy is a purported claim against the said Morris Trieber for damages alleged to have been made by said Morris Trieber, and that it is further alleged in paragraph X of said petition that the said bankrupt corporation suffered additional damages in the sum of \$10,000; and that it is further alleged that the said corporation demands exemplary and punitive damages against the said Morris Trieber in the sum of \$15,000; and the said Trustee in the *party* of the said petition prays for an order by your Honor that the said Morris Trieber pay to said Trustee the sum of \$40,675.28 together with interest at legal rate on the sum of \$15,675.28 from April 30, 1951, forward; that your Honor has no jurisdiction to make any such order, and that this Honorable Court has no jurisdiction to make any such order; that such an order or judgment could be

made only if a trial before a court of competent jurisdiction, and after a verdict of a jury duly empaneled and sworn to try the cause, or upon findings made by the court in such cause, if trial by jury were waived; and in this behalf the said Morris Trieber further represents and shows to your Honor that this Honorable Court would in any event have no jurisdiction of any action brought by the said Trustee in bankruptcy to recover said sum or any other sum of money claimed to be due from said Morris Trieber to said bankrupt, by reason of any alleged fraud, or otherwise, for the reason that there is no diversity of citizenship between the parties, and the jurisdiction of any such action is in the Court of the State of California whose jurisdiction cannot be ousted by any order that your Honor might make.

“II.

“And for Further Answer and Return to the Said Order to Show Cause and as Further Ground for the Dismissal and Discharge of the Same and for Further Ground of Objection to the Jurisdiction of This Court to Hear and Determine Any of the Matters and Things Set Forth in the Aforesaid Petition of the Said Trustee in Bankruptcy, the Said Morris Trieber Alleges and Shows:

“That all and singular the matters and things set forth by the said trustee in bankruptcy as grounds for the order and relief sought herein by the said trustee, and all and singular the claims of the said trustee therein set forth cannot be maintained by said trustee in this proceeding for the reason that the said trustee is barred and

precluded from maintaining the same by virtue of a said judgment and order heretofore, to wit, on the 3rd day of August, 1954, duly given, made and entered in and by the Superior Court of the State of California in and for the City and County of San Francisco, and numbered therein 431,888 in which Gayne Sales Co., Inc., a corporation, the bankrupt in this proceeding, was plaintiff and the said Morris Trieber was defendant in which a certain second amended complaint for damages for fraud, breach of contract and money had and received was sustained by said Superior Court without leave to amend; that the said second amended complaint was based upon the same purported cause of action and involved in all respects the said matters and things and all and singular the same claims as are set forth in the present proceeding by the said Referee in bankruptcy, all of which from the said second amended complaint in the action last aforesaid, a copy of which is hereunto annexed as Exhibit 'A' and made a part hereof, fully and at large appears.

“That a copy of the Minute Order sustaining the said demurrer of the said Morris Trieber to the said complaint of the said Gayne Sales Co., Inc., a corporation, without leave to amend is hereunto annexed and made a part hereof in like manner and with like effect as if heretofore set forth in its entirety.

“And in this behalf the said Morris Trieber further shows to your Honor that thereafter and on the 11th day of August, 1954 the said Gayne Sales Co., Inc., appealed from the order of said Superior Court to the Supreme Court of the

State of California from the order of the said Superior Court sustaining the demurrer of the said Morris Trieber to the second amended complaint of Gayne Sales Co., a corporation, the bankrupt herein, without leave to amend; and the said Morris Trieber further shows that thereafter, and prior to the first day of December, 1954, the said Supreme Court of the State of California, in the exercise of the jurisdiction conferred upon it by the Constitution of the State of California, duly transferred the said appeal to the District Court of Appeal of the State of California in and for the First Appellate District Division Two, and that on the first day of December, 1954, the said Gayne Sales Co., Inc., a corporation, filed in said District Court of Appeal a certain brief, in which the said corporation sets forth in substance and effect all of the matters and things now set forth in the present proceeding by the said Referee in bankruptcy that thereafter and on the 20th day of December, 1954, the said Morris Trieber filed in the said District Court of Appeal, a notice of motion to dismiss the said appeal of the said Gayne Sales Co., Inc., from the said order sustaining the said demurrer to the second amended complaint without leave to amend, and filed therewith a Memorandum of Points and Authorities in support of the said motion;

“That thereafter and on the 10th day of January, 1955, the said motion to dismiss the said appeal from the said order of said Superior Court, came on regularly to be heard before the said District Court of Appeal and was argued by counsel; in consideration whereof it

was by the said District Court of Appeal, ordered, adjudged and decreed that the said motion be granted and that the said appeal of the said Gayne Sales Co., Inc. be dismissed; and that by reason of all and singular the premises, the said judgment in the aforesaid action of Gayne Sales Co., Inc. v. Morris Trieber, is res judicata as to all and singular the matters before your Honor and before this Honorable Court in the instant cause, and the said Gayne Sales Co., Inc., and its said trustee in bankruptcy are, and each of them is, estopped and concluded from seeking the order prayed for herein and from obtaining any of the relief sought by them or by either of them; and your Honor and this Honorable Court are likewise estopped and precluded from granting any relief in the premises to the said bankrupt or to the said trustee in bankruptcy.

“III.

“And for Further Answer and Return to the Said Order to Show Cause Said Morris Trieber Respectfully Shows to Your Honor:

“That the purported cause of action and each and every of the said purported causes of action and any and all matters and things whatsoever set forth herein by the said Trustee in bankruptcy are barred by the Statute of Limitations as set forth in Subdivision 4 in Section 338 of the Code of Civil Procedure of the State of California.”

The prayer of the answer and return is that the order to show cause be dismissed and discharged, that the trustee take nothing thereby, and that it be held

and considered that the Court has no jurisdiction of the proceeding. (TR 26.)

Annexed to the answer is a copy of a second amended complaint filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and numbered therein 431,888 and entitled Gayne Sales Co., Inc., a corporation, v. Morris Trieber. (TR 26 *et seq.*)

On January 10, 1956, the referee made an order which, after certain preliminary recitals, reads as follows:

“It hereby is ordered, adjudged and decreed:

“1. That this bankruptcy court has jurisdiction over said Morris Trieber and said subject matter;

“2. That the objection to jurisdiction of said Morris Trieber be, and said objection is, overruled;

“3. That January 30, 1956, be, and said last mentioned date is, hereby fixed for the hearing on the merits of the trustee's said objection and/or the trustee's said petition for turn-over order, and that said hearing, on the merits, be held on said last mentioned date, commencing at the hour of 10:00 o'clock a.m. of said last mentioned day, at Room 609 Grant Building, 1095 Market Street, San Francisco, California, to be postponed and/or continued from time to time thereafter as the circumstances shall warrant.” (TR 43, 44.)

On January 13, 1956, the appellant filed in the District Court a petition for review of the said order of the referee by a judge. (TR 44, *et seq.*) This peti-

tion, after setting forth the order of the referee *in haec verba*, assigns seven errors in respect thereto.

The first of these is that neither the Court nor the referee had any jurisdiction to determine the petition of the trustee in bankruptcy, for the reason that the order sought to be reviewed was made in a case of a contest between the trustee in bankruptcy and Trieber, who was not a party to the bankruptcy proceedings, and whose rights, claims and defenses could not be summarily adjudicated by the referee or by the Court.

The second error assigned is that the petition of the referee in bankruptcy sets forth a purported claim for both compensatory and exemplary damages against Trieber, and prays for an order that Trieber pay and turn over to the trustee the sum of \$40,675.28, together with interest at the legal rate in the sum of \$15,675.28 from April 30, 1951 forward.

The third error assigned is that neither the Court nor the referee has any jurisdiction to make any such order; "that such an order or judgment could be made only upon a trial before a court of competent jurisdiction, and after verdict of a jury duly impaneled and sworn to try the cause, or upon findings made by the court in such cause, if trial by jury were waived."

The fourth error assigned is that neither the Court nor the referee would have any jurisdiction over such an action, for the reason that there is no diversity of citizenship between the parties, and the jurisdiction

of any such action is in the courts of the State of California.

The fifth and sixth grounds set forth the judgment of the State Court in *Gayne Sales Co., Inc. v. Trieber*, which Trieber's return describes in detail, and the dismissal of the bankrupt corporation's appeal by the District Court of Appeal of the State of California, as *res judicata*.

The seventh ground sets forth that the purported cause of action set forth in the petition of the trustee in bankruptcy against Trieber is barred by the Statute of Limitations of the State of California, as set forth in Subdivision 4 of Section 338 of the California Code of Civil Procedure.

The prayer of the petition is that the order of the referee be reviewed by one of the judges of the District Court, and that the petition of the trustee be dismissed and the order to show cause discharged. (TR 46-52.)

On April 11, 1956, the District Court made an order, which, after certain preliminary recitals, concludes as follows:

"It appears that the order of the Referee involved here was interlocutory and not final, and that therefore this Court should not review the order. See *Collier on Bankruptcy* § 39.21. Accordingly, the petition for review is hereby dismissed and the cause is remanded to the Referee for a hearing on the merits, reserving to the petitioner all his objections to the jurisdiction of the Referee." (TR 53.)

On April 16, 1956, Trieber appealed to this Court from the said order of the District Judge. (TR 54.)

SPECIFICATION OF ERRORS RELIED UPON.

1. That the District Judge erred in holding that the order of the referee here involved was interlocutory and not final, and therefore should not be reviewed.

2. This specification of error is fully set forth in Subdivision I of the Answer and Return of Morris Trieber to the order to show cause, and restatement of the same is hereby omitted in the interest of brevity. (TR 20.)

3. This specification is fully set forth in Subdivision II (*res judicata*) of the said answer and return, and the repetition of the same is here omitted, in the interest of brevity. (TR 22.)

4. This specification is set forth in Subdivision III (Statute of Limitations) of the answer and return of Morris Trieber to the order to show cause (TR 25), and is omitted here in the interest of brevity.

ARGUMENT OF THE CASE.

SUMMARY OF THE ARGUMENT.

The jurisdiction of this Court in bankruptcy matters extends to interlocutory as well as to final orders, and a review should be had in all cases where a substantial right is involved. The appellant should not be compelled to undergo the delay and expense of

a long hearing before the referee, if the bankruptcy court lacks jurisdiction to grant the demand of the trustee for damages, both compensatory and punitive, in a summary proceeding, thus denying appellant the constitutional right to a trial by jury. The return of the appellant to the order to show cause, which is not controverted, shows that the claim of fraud has already been adjudicated by the state Court in a controversy between appellant and the bankrupt corporation; and shows, moreover, that since the trustee stands in the position of the bankrupt, he is barred by the applicable statute of limitations of the State of California.

I.

THE APPELLATE JURISDICTION OF THIS COURT IN BANKRUPTCY PROCEEDINGS INCLUDES INTERLOCUTORY AS WELL AS FINAL ORDERS.

We discuss this subject at the outset because we anticipate a motion by the appellee to dismiss this appeal upon the ground that the order appealed from is an interlocutory and not a final order. We shall proceed to show that, under the plain provisions of the statute, the jurisdiction of this Court includes interlocutory orders in bankruptcy:

Section 47, Title 11, U.S.C.A., reads as follows:

“Jurisdiction of appellate courts.

“(a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter

held, are invested with appellate jurisdiction from the several courts of bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact; *Provided, however*, that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further*, That when any order, decree, or judgment involves less than \$500, an appeal therefrom may be taken only upon allowance of the appellate court.

“(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

“(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.”

It would seem that this language is so clear that he who runs may read; yet its force and effect seem to have been lost sight of in decisions handed down since the amendment of 1938, which ignore that the distinction in the former statute between “proceedings” and “controversies” no longer exists, and that interlocutory as well as final orders are appealable, subject only to the rule that the order must not be of a purely formal or trivial character; in other words, the order must be one which affects substantial rights of the appellant.

Remington (Vol. 8, p. 323), under the heading, "Appealable Orders; in General", thus states the situation as it now exists with respect to appeals from orders in bankruptcy:

"The original provisions of Sections 24-25 of the 1898 bankruptcy act were quite at variance from the present form. It contemplated possible use of a writ of error or of certiorari, as well as appeals in equity; were so phrased as to indicate a distinction between 'controversies arising in bankruptcy' and 'bankruptcy proceedings'; and the only expressly appealable orders were (1) a judgment adjudging bankruptcy, (2) a judgment granting or giving a discharge, and (3) a judgment allowing or rejecting a claim of \$500 or more. To state that this left things in considerable doubt and uncertainty reflects polite restraint in the use of stronger terms. In certain respects, some of the older decisions still have value, but the majority of them, since the 1926 and 1938 amendment of the sections herein involved, are worthless. It can be said now that appeal lies from *any* order, either interlocutory or final, whether entered in a 'controversy arising in bankruptcy', or in a 'bankruptcy proceeding', by which the appellant is aggrieved. *There is no longer any doubt about the appealability of the various and sundry intermediate or interlocutory orders in the course of bankruptcy administration, provided they have actual significance.*"

The provisions of Section 24 of the Bankruptcy Act, as amended in 1938, 11 U.S.C. Sec. 47, in respect of the review by appeal of interlocutory orders in proceedings in bankruptcy, have been applied or in-

voked in the instances hereinafter noted in which the order in question was expressly characterized by the Court as such an order, or has been deemed to be such although not expressly so characterized, with the results stated.

In the following instances, in addition to the others subsequently noted, the order in question has been held or declared appealable, or an appeal therefrom has been entertained:

An order denying a motion by the debtor to dismiss an involuntary petition in bankruptcy (*Harris v. Mills Novelty Co.*, 106 Fed. 2d 976; *Theard v. Fidelity & Deposit Co.*, 202 Fed. 2d 880) or for the reorganization of a corporate debtor.

An order in a reorganization proceeding appointing a person other than a referee as a special master to take testimony and report as to the fairness and reasonableness of a proposed compromise offer, the Court having intimated that if such offer should be accepted and approved the debtor corporation would be returned to the stockholders and the proceeding would be dismissed.

An order of contempt for failure to produce books of account relating to the business of the bankrupt. (*Robertson v. Berger*, 102 Fed. 2d 530.)

An order denying the petition of the trustee for an order directing a witness to answer certain questions and produce certain memoranda in an examination under Section 21(a) of the Bankruptcy Act, 11 U.S.C. Sec. 44(a). (*Re Bush Terminal Co.*, 105 Fed. 2d 150.)

An order denying a motion of tax authorities for the dismissal of a petition of the debtor's trustee alleging that taxes assessed against the debtor were excessive and praying that the Court hear and determine the amount and legality of the taxes in question. (*Arkansas Corp. Commission v. Thompson*, 116 Fed. 2d 179, reversed on other grounds, 313 U.S. 132, 85 L. Ed. 1244, 61 S. Ct. 888.)

An order denying the motion of a creditor to withdraw a claim previously filed by it in the bankruptcy proceeding. (*Kelso v. Maclaren*, 122 Fed. 2d 867.)

An order denying the motion of a creditor, against whom a counterclaim had been filed by the trustee, for the dismissal of the counterclaim insofar as it exceeded the amount of the creditor's claim, on the ground that the Court was without jurisdiction of the creditor by reason of his nonresidence and the lack of service of process. (*Columbia Foundry Co. v. Lochner*, 179 Fed. 2d 630, 14 A.L.R. 2d 1349.)

An order in a reorganization proceeding refusing to recognize a state Court judgment obtained against the debtor on a claim for damages for a personal injury sustained after the institution of the proceeding as proof of such claim and remanding the claim to the master for hearing on the merits. (*Re Chicago & E. I. R. Co.*, 121 Fed. 2d 785, certiorari denied, 314 U.S. 653, 86 L. Ed. 523, 62 S. Ct. 102.)

An order requiring the referee to furnish to a creditor a transcript of testimony taken in an examination under Section 21a of the Bankruptcy Act. (*Re Winton Shirt Corp.*, 104 Fed. 2d 777.)

An order in a reorganization proceeding impounding the list of the debtor's creditors and stockholders and providing that use of the list for the purpose of sending communications to security holders should be permitted only separate applications to the Court to authorize specific communications. (*Delatour v. Meredith*, 144 Fed. 2d 594.)

An order approving an order of the referee instructing the trustee not to pay a sum required to extend the bankrupt's leasehold interest in property occupied by it. (*R. J. Rosen & Sons, Inc.*, 130 Fed. 2d 81.)

An order in a reorganization proceeding authorizing the sale by the trustee of certain real property alleged to belong to the debtor. (*Hoehn v. McIntosh*, 110 Fed. 2d 199.)

An order in a proceeding under Section 75 of the Bankruptcy Act, 11 U.S.C. Sec. 203, denying a motion of creditors of the debtor for leave to foreclose their mortgages. (*Federal Land Bank v. Hansen*, 113 Fed. 2d 82.)

An order denying the bankrupt's motion to complete the record upon the referee's refusal to transmit to the Court, on review of his order denying a discharge, copies of motion before referee to vacate his findings and documents attached thereto as exhibits. (*Re Leigh*, 139 Fed. 2d 386.)

An order affirming the action of the referee in sustaining the exceptions of the bankrupt to a portion of a creditor's specifications of objections to her

discharge, and overruling others. (*Morris Plan Industrial Bank v. Schorn*, 135 Fed. 2d 538.)

In the case of *In re Leigh*, 139 Fed. 2d 386, the referee in bankruptcy made findings indicating that he would deny the discharge of the bankrupt on the ground that he had failed to keep proper financial records. The bankrupt moved to vacate these findings, which motion was denied by the referee. The bankrupt then filed a timely petition for review of the order, and the referee refused to transmit to the District Court either a copy of the motion or copies of certain Court records which were attached to them. The bankrupt moved for a completion of the record in the District Court. This motion was denied and an appeal was taken to the United States Court of Appeals for the District of Columbia. At page 387, that Court, reversing the District Court, uses the following language:

“Courts have refused appeals from interlocutory orders in bankruptcy which are trivial in their effect on the proceedings, but this is not the case here. A bankrupt who seeks a review of an order on a motion is entitled to have the court consider the motion papers and all the exhibits as they were presented to the referee, and this is a *substantial right*.”

The Court, while holding that the petitioner had misconceived his remedy in seeking a special appeal and that it must look to the Bankruptcy Act for its jurisdiction, states:

“That act authorizes an appeal of right from all bankruptcy orders, interlocutory as well as

final, except where money alone is involved and the amount is less than \$500."

The Court proceeds to state, however, that it would not be in the interest of justice to dismiss a special appeal merely to have it presented again in different form, and that it would "take jurisdiction of this case on the papers before us as an *appeal of right*."

The limitation on the right to appeal from interlocutory orders is thus stated in *Federal Land Bank v. Hansen*, 113 Fed. 2d 82, by the Circuit Court of Appeals of the Second Circuit:

"Appeals should be dismissed only when the court has no jurisdiction to review any aspect of the action taken below. When the order below is re-examined, even to the limited extent of determining whether or not the discretion of the District Court has been abused, the appellate court exercises its appellate jurisdiction, and affirmance or reversal would appear to be required. The present order was an interlocutory one. *Even in bankruptcy*, various interlocutory orders which determine nothing, such as orders merely of reference for report, are not reviewable and appeals will be accordingly dismissed. Other interlocutory orders are reviewable for abuse of discretion alone. Appeals from such orders have occasionally been dismissed, but we believe it is better practice to affirm if no abuse of discretion is shown (citing cases)."

We have emphasized the phrase "even in bankruptcy" in the foregoing quotation because it is obvious that the Court recognizes that, in contrast with

appeals generally, in which review is limited to final judgments or decrees, appeals in bankruptcy run from interlocutory orders. This, of course, is in conformity with the plain provisions of the statute as it now stands.

The case of *Pearson v. Higgins*, 34 Fed. 2d 27, in which the Circuit Court of Appeals of this Circuit held that an order of the District Court denying review of a referee's determination that the bankruptcy Court had jurisdiction in a summary proceeding, was not an appealable order, is no longer the law, in view of the amendments to the sections of the Act relating to appeals.

It is remarkable that, on this circuit, as late as 1949 it was held that an interlocutory order in a "controversy" in bankruptcy, as distinguished from a "proceeding" in bankruptcy, was not appealable, despite the fact that subdivision (a) of Section 47 specifically authorizes appeals both in "controversies" and in "proceedings". It is quite obvious that the Court relied upon decisions prior to the amendment of 1938, and that the drastic and sweeping changes in the law were not called to the attention of the Court.

In *Goldie v. Carr*, 116 Fed. 2d 325, this Court dismissed an appeal from an order overruling defendant's objection to the jurisdiction of the bankruptcy Court to compel the appellant to turn over certain corporate shares and moneys alleged to be held in trust for the debtor's estate. The Court says that the order was plainly interlocutory in character and that no turnover order had been made. In regard

to the amendment of June 22, 1938, embodied in the Chandler Act, the Court says that Act—the controlling law here—does not make an interlocutory order in a controversy in bankruptcy appealable. This language directly contradicts the plain provisions of Section 47(a) itself, which makes interlocutory orders appealable whether made in a *controversy* in bankruptcy or in a *proceeding* in bankruptcy. It is submitted that this language must have been inadvertently used, and that the Court, in spite of its reference to the amendment, relied upon decisions prior to its adoption. This is clear from the fact that in support of the statement it cites *Pearson v. Higgins*, *supra*; *In re Federal Photo Engraving Corp.*, 54 Fed. 2d 628, and *Lieberman v. Bancroft*, 59 Fed. 2d 202, all of which were decided prior to the effective date of the 1938 amendment.

In *Arkansas Corporation Commission v. Thompson*, 116 Fed. 2d 179, in which the commission appealed from an interlocutory order denying its motion to dismiss a proceeding brought by the trustee, which alleged that the property of the railroad had been assessed in excess of its fair market value, the Circuit Court of Appeals of the Eighth Circuit says:

“In limine the trustee has presented that this court should decline to maintain this appeal because the order appealed from is a proceeding in bankruptcy and is manifestly interlocutory and is not conclusive of the merits of the controversy between the trustee and the Arkansas tax authorities. But we conclude that the appeal is authorized by the provisions of Section 24,

Subdivisions a, b of the Bankruptcy Act as amended June 22, 1938, 52 Stat. 854, 855, 11 U.S.C.A. Sec. 47, subs. a, b, and decline to dismiss it.”

In *Cohen v. Eleven West 42d Street, Inc.*, 115 Fed. 2d 531, the Circuit Court of Appeals of the Second Circuit, reversing an order denying a motion for a summary judgment, says at page 533:

“The appellee suggests that the order, being interlocutory, is not appealable. In an action that would of course be true, for it merely refuses to dispose of the case without a trial (*In re Finkelstein*, 102 Fed. 2d 688; *Jones v. St. Paul F. & M. Ins. Co.*, 108 Fed. 2d 123, 125.) *But in bankruptcy, interlocutory orders are in general appealable.* (*Robertson v. Berger*, 102 Fed. 2d 530; *In re Winton Shirt Corp.*, 104 Fed. 2d 777.) And this was not an example of that class of orders which are *merely incidents* in an inquiry pending in the District Court (*In re Hotel Governor Clinton*, 107 Fed. 2d 398, 399).”

In *Columbia Foundry Co. v. Lochner*, 179 Fed. 2d 630, 14 A.L.R. 2d 1349, the law of appeals from interlocutory orders in bankruptcy is very aptly summarized by Judge Soper of the Fourth Circuit in the following language:

“It is urged upon us that this appeal should be dismissed as premature since it relates only to the jurisdiction of the court to render an affirmative judgment against the creditor and does not represent a final judgment in which the rights of the parties are determined. Section 24,

sub. a, 11 USCA Sec. 47, sub. a, of the Bankruptcy Act provides that the Circuit Courts of Appeals are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdiction in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy. Since the appeal in the instant case is from an interlocutory order, it is premature unless it was entered in a proceeding in bankruptcy. Although the line of demarcation between proceedings and controversies is uncertain, it is generally accepted that questions between bankrupt and his creditors, such as is presented in the instant case, fall into the category of proceedings in bankruptcy. *Matter of National Finance & Mortgage Corp.*, 9 Cir., 96 F. 2d 74; *Broders v. Lage*, 8 Cir., 25 F. 2d 299; *Morehouse v. Pacific Hardware & Steel Co.*, 9 Cir., 177 F. 337; *Collier on Bankruptcy*, 14th Ed., Vol. 2, Sec. 24.12.

“The appeal under Section 24, sub. a, from an interlocutory order involving \$500 or more in a proceeding in bankruptcy is generally one of right; but the decision limits the appeal to interlocutory orders which have the character of a formal exercise of judicial power affecting the asserted rights of a party and an appeal from an interlocutory order involving the exercise of the trial court’s discretion is allowed only upon a showing of an abuse of discretion. See *Collier on Bankruptcy*, supra, Secs. 24.11, 24.39. Clearly due regard for the efficiency and dispatch of bankruptcy proceedings requires that the right of appeal from interlocutory orders under Section 24, sub. a, be kept within reasonable bounds.

“However, even prior to the enactment of Section 24, sub. a, an interlocutory order overruling an objection to jurisdiction had been held appealable. *In re Margolies*, 2 Cir., 266 F. 203; see *In re Hotel Governor Clinton, Inc.*, 2 Cir., 107 F. 2d 398, 399. It is our view that in consideration of the importance of the question involved, the appeal in this case should be entertained, and the motion to dismiss is therefore denied.”

II.

NEITHER THE REFEREE NOR THE DISTRICT COURT IN BANKRUPTCY HAS ANY JURISDICTION TO MAKE THE ORDER SOUGHT BY THE TRUSTEE, OR TO HEAR OR DETERMINE HIS CLAIM FOR DAMAGES OR, MORE PARTICULARLY, TO MAKE THE “TURNOVER” ORDER PRAYED FOR.

1. A court of bankruptcy has no jurisdiction to try a controversy between the trustee and one not a party to the proceeding; and even the District Court may not, in the exercise of its law or equity jurisdiction, hear and determine such a suit in the absence of diversity of citizenship.

The law has been well settled for many years by well considered decisions of the Supreme Court of the United States that a referee in bankruptcy, and the District Court sitting in bankruptcy proceedings, have no jurisdiction to try title to property claimed adversely by one not a party to the bankruptcy proceedings. In other words, such a question of title cannot be summarily tried in the absence of the consent of the defendant, unless he appears in the bank-

ruptcy Court and consents to have his title tried in that manner.

Weidhorn v. Levy, 253 U.S. 268, 40 S. Ct. 534;
Harris v. First National Bank, 216 U.S. 382,
 30 S. Ct. 296, 54 L. Ed. 528.

The jurisdictional point that we make is not merely that the referee in bankruptcy has no jurisdiction to try and determine adverse claims in the *bankruptcy proceeding*; BUT

The Federal Court itself would have no jurisdiction over a suit (which formerly would have been on the equity side) brought by the trustee to recover property claimed to belong to the bankrupt, or over any suit to recover damages *ex contractu* or *ex delicto* against a third party who denied the claim, in the absence of a showing of diversity of citizenship.

We may add that the language used in some of the decisions as to consent is seriously questionable, because of the universal rule that *the party cannot, by consent*, give a Court, as such, jurisdiction in a matter which is excluded by the laws of the land.

Thus in *Kaigler v. Gibson*, 264 Fed. 240, it is said that

“a trustee cannot sue in a Federal Court where there is no diversity of citizenship and no Federal question, unless he brings the case within one of the exceptions.”

It is also added:

“It may be doubted whether the consent of the defendant mentioned above (referring to a sec-

tion of the Bankruptcy Act) extends further than to a question of venue, which may be waived. As a general rule, Federal jurisdiction, properly so-called, cannot be so conferred. *Minnesota v. Northern Securities Co.*, 194 U.S. 43."

And the Supreme Court in *Lovell v. Newman*, 227 U.S. 412, 33 S. Ct. 375, says that the consent provided for in the Act

"certainly was not intended to enlarge the jurisdiction of the circuit courts of the United States so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy, or by reason of a cause of action arising under the constitution or laws of the United States."

In any event, the entire question of jurisdiction was set at rest as long ago as January 14, 1929, in a brief *per curiam* decision by the Supreme Court of the United States in *State Trust & Savings Bank v. Dunne*, 278 U.S. 582, 73 L. Ed. 518, 49 S. Ct. 184.

To understand that decision it is necessary to examine the opinion of the Circuit Court of Appeals in the same case (24 Fed. 2d 477). A trustee in bankruptcy, to use the language of the Circuit Court of Appeals for the Fifth Circuit,

"brought suit to recover certain collaterals, alleging title to the same to be in him as trustee, and also averring that they had been transferred by the bankrupt within four months prior to the filing of the petition with intent and purpose on its part to hinder, delay and defraud its creditors in violation of the provisions of Section 67e of

the Bankrupt Act. In the alternative the bill prayed for an accounting and for recovery of the value of the collaterals, less any amount found to be due appellant."

The District Court rendered a decree or judgment in favor of the plaintiff, and this was affirmed by the Circuit Court of Appeals, which said in part:

"It is contended by appellant that the District Court was without jurisdiction. The allegations of the bill were sufficient to show a cause of action arising under Section 67e of the Bankruptcy Act. We must put aside consideration of the merits as to that part of the bill, not as being without substance, but as unnecessary to be decided. The asserted ground of jurisdiction required the District Court to take jurisdiction initially and have done so, to decide the equities of the case."

A petition for a writ of certiorari was filed with the Supreme Court of the United States, and on January 14, 1929, the Court said:

"*Per curiam*: Reversed, for the reason that there is no Federal jurisdiction over the cause. (*Wood v. A. Wilbert's Shingle & Lumber Co.*, 226 U.S. 384, 57 L. Ed. 264, 33 S. Ct. Rep. 125; *Weidhorn v. Levy*, 253 U.S. 268, 64 L. Ed. 898, 40 S. Ct. Rep. 534, *Taubel-Scott-Kitzmiller Co., v. Fox*, 264 U.S. 426, 68 L. Ed. 770, 44 S. Ct. Rep. 396.)"

2. Neither the referee nor the District Court has any jurisdiction to make the "turn-over" order sought by the trustee.

The effect of this order would not merely mean that a summary judgment would be rendered against Trie-

ber without a trial, by jury or otherwise, but also that he would be ordered to pay the entire amount claimed as damages by the trustee, and that if he refused to do so he could be attached and punished for contempt of Court, and ordered to stand committed until he paid to the trustee all the alleged compensatory and punitive damages, before the suit was ever tried.

This, as we heretofore stated, is indeed something novel in the law. It harks back to the horrors of debtors' prison and the infamies of the Wardens of the Fleet, described so vividly by the Earl of Birkenhead in his work on "Celebrated Criminal Trials."

The vice of the attempt in the case at bar is clearly pointed out by Justice McReynolds in *Daniel v. Guaranty Trust Co. of New York*, 285 U.S. 154, 52 S. Ct. 326, 78 L. Ed. 675:

"In the circumstances, did the referee have jurisdiction to enter the turnover order against the Trust Company? The answer must be 'No' unless that company, by filing its petition for reclamation entered its general appearance and in effect consented to submit itself to summary proceedings before that officer in respect of matters having no immediate relation to the claim which it had presented.

"In practice, such a rule might lead to unfortunate complications and deprive owners of property of fair opportunity to recover. The risk incident to a general appearance and consent to adjudication of claims of all kinds might easily deter where the right to recover is clear. Moreover, the choice would not be between tribunals merely, but between the ordinary processes in a

plenary suit and a summary hearing. We are not cited to any opinion by an appellate court which definitely approves the view advanced by the petitioner. We cannot conclude that the demand for speedy administration of bankrupt estates is enough to justify such a radical departure from ordinary procedure. And the suggestion that it is possible to impose equitable terms as a condition to an order of reclamation is not helpful."

It is, indeed, something new to ask a court to order a litigant, under the pains and penalties of contempt, to pay both compensatory and punitive damages to his adversary.

We again submit that neither the Referee nor the Court can make any such order.

"Jurisdiction in summary proceedings, being of statutory authority, and based upon necessity to prevent threatened loss to the rightful owners of property, or defiant disobedience to the orders and decrees of courts, should not be enlarged by construction or implication."

In re Cox-Rackley Co., 245 Fed. 376.

We shall proceed to show that the order sought by the trustee will issue only in cases in which the adverse party is actually in the possession of property belonging to the bankrupt estate, or where the summary process is used "to recover possession of property which has been in the court's possession and has been wrongfully taken away."

Chandler v. Perry, 74 Fed. 2d 371.

In *Maggio v. Zeitz*, 333 U.S. 56, 68 S. Ct. 401, 92 L. Ed. 476, the Supreme Court unanimously reversed a commitment for contempt of court for failure to comply with a "turn over" order which had been affirmed by the Circuit Court of Appeals. (157 Fed. 2d 951.)

At 68 S.Ct. 405, Mr. Justice Jackson, who delivered the opinion of the majority of the Court, says of a "turnover" order:

"But this procedure is one primarily *to get at property rather than to get at a debtor*. Without pushing the analogy too far, it may be said that the theoretical basis for this remedy is found in the common law actions to recover possession—detinue for the unlawful detention of chattels and replevin for their unlawful taking—as distinguished from actions in trespass or trover *to recover damages* for the withholding or for the value of the property. Of course the modern remedy does not follow any of these ancient and often overlapping procedures, but the object—*possession of specific property*—is the same. The order for possession may extend to proceeds of property that has been disposed of, if they are sufficiently identified as such. But it is essentially a proceeding for *restitution* rather than indemnification, with some characteristics of a proceeding in rem; the primary condition of relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. It is in no sense based on a cause of action for *damages* for tortious conduct such as embezzlement, misappropriations, or improvident dissipation of assets."

In no other case is the injustice and absurdity of such proceedings as the one at bar stated more forcibly than by the Circuit Court of Appeals of the Second Circuit in the case of *In re Luma Camera Service*, 157 Fed. 2d 951:

“We would hold that a turn over proceeding may not, via a fiction be substituted for a criminal prosecution so as to deprive a man of a basic constitutional right, the right of trial by jury. We would note, too, that one consequence of the fiction is that the respondent may be twice punished for the same offense, since, if he later is indicted for violation of 11 U.S.C.A. Section 52, sub. b, his imprisonment for contempt will not serve as a defense. We would add that nowhere in the Bankruptcy Act has Congress even intimated an intention to authorize such results, and that they stem solely from a judge-made gloss on the statute.” (Italics by the Court.)

In *Cline v. Kaplan*, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed. 97, it is said at page 155 of 65 S. Ct.:

“If the property is not in the court’s possession and a third party asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated ‘in suits of the ordinary character, with the rights and remedies incident thereto.’ ”

In support of this statement, Justice Frankfurter cites *Galbraith v. Vallely*, 256 U.S. 46, 41 S. Ct. 415, 65 L. Ed. 823 and *Taubel-Scott-Kitzmiller Co. v. Fox*, *supra*.

It is further held that:

“Consent (to proceed summarily) is wanting where the claimant has throughout resisted the petition for a turn over order and where he has made formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a formal order.”

We further call the attention of the Court to the very learned and exhaustive opinion of Judge Sanborn of the Eighth Circuit in the case of *In re Rathman*, 183 Fed. 913, which has often been cited with approval, it having been said in a later decision that “Judge Sanborn reviews all of the decisions and discusses exhaustively the cases in which a summary proceeding may be resorted to.” (*In re Cox-Rackley Co.*, 245 Fed. 367.)

Space forbids lengthy quotations from the *Rathman* case. It is sufficient to say that he prefaces his discussion with the statement that the trustee may not escape “from the declarations of the Supreme Court that the jurisdiction of the Bankruptcy Court summarily to determine claims to lien upon and title to property claimed as that of the bankrupt arises out of its actual possession of the property, (citing cases) and is exclusive of all other grounds because the actual possession draws to it the legal custody of the property (etc.)”.

An outstanding decision which specifically holds that money or the property of the bankrupt estate, not in the actual or constructive possession or control of the trustee, are not subject to the summary juris-

diction of the bankruptcy Court, and cannot be recovered by a "turn over" order, is *In re Joslyn's Estate*, 168 Fed. 2d 803, in which the Circuit Court of Appeals for the Seventh Circuit says, at page 806:

"The law is well established that a Bankruptcy Court does not have summary jurisdiction over a turnover proceeding to recover an alleged indebtedness due from a third party to the bankrupt estate, or on property rights claimed by an adverse party who is in possession and makes timely objections to the summary jurisdiction."

In *Dwyer v. Franklin*, 227 Fed. 2d 152, decided January 2, 1956, the Court of Appeals of the Seventh Circuit, holds (We quote the syllabi in the Federal Reporter in lieu of quotation from the decision itself):

"1. Though filing a claim in Bankruptcy Court is an implied consent to summary adjudication by that court of any counter-claims based upon the subject matter of that claim, it is not an implied consent to summary adjudication in Bankruptcy Court of a counterclaim arising out of subject matter which has no relation to that claim. Bankr. Act. Paras. 2, sub.a(7), 23, subs. a, b, 60, 70 and sub. e, 11 U.S.C.A., Paras. 11, sub.a(7) 46, subs. a, b, 96, 107, 110 and sub. e.

2. Where former director of bankrupt corporation filed claim for goods sold bankrupt, and trustees asserted counterclaim based on breach of claimant's fiduciary duty as director, bankruptcy court did not have jurisdiction to determine counterclaim in absence of consent of claimant which could not be implied from filing of

claim. Bankr. Act. Paras 2, subd. a(7) 23, subs. a, b, 60, 67, 70 and sub. e, 101-276, 301-399, 11 U.S.C.A. Paras. 11, sub. a(7), 46, subs. a, b, 96, 107, 110 and sub. e, 501-676, 701-799.

3. Trustees' unliquidated claim for damages against creditor, and creditors' claim against bankrupt for goods sold were not 'mutual debts', within provision of Bankruptcy Act authorizing the setoff of mutual debts. Bankr. Act. Para. 68, sub. a, 11 U.S.C.A. Para. 108 sub. a.

4. The phrase 'account stated' in provision of Bankruptcy Act authorizing the setoff of mutual debts between a creditor and a bankrupt means an agreement between the parties to an account based upon prior transactions between them, and does not authorize trustee to setoff or counterclaim an unrelated, unliquidated claim for damages against creditor's claim for goods sold and delivered to bankrupt. Bankr. Act, Sec. 68, sub. a, 11 U.S.C.A. Sec. 108, sub. a."

III.

THE PURPORTED CLAIM FOR AFFIRMATIVE RELIEF BY THE TRUSTEE IS BARRED BY THE STATUTE OF LIMITATIONS.

The separate defense of the trustee, shows upon its face that the alleged fraudulent representations alleged to have been made by Morris Trieber to the officers and directors of the bankrupt corporation were made on April 30, 1951, and that the stock certificates alleged to have been issued to Trieber and others were issued on the same day. The trustee's so-called "Separate and Distinct Defense," which is in reality in the nature of a cross complaint, was not filed until June

20, 1955, or more than four years after the date on which the fraud was alleged to have been committed and consummated.

Thus, the claim of the referee for affirmative relief is clearly barred by the statute of limitations unless the party who alleges the fraud has pleaded himself out of the statute by a proper allegation of nondiscovery. The only attempt made by the referee in that behalf is in paragraph IX of the Separate Defense and is as follows:

“That thereafter and within three years last past, the officers and directors of said corporation, other than the said Trieber, for the first time discovered that the representations of the said Trieber, made to the said corporate officers and directors as above alleged on or about the 8th day of March, 1951, were false and untrue and were known by the said Morris Trieber to be false and untrue, etc.”

There is no allegation anywhere in this pleading of the facts and circumstances which led to the discovery, or why the discovery was not made sooner, or that the discovery could not have been made within the statutory period by the exercise of reasonable diligence on the part of the corporation or its officers.

The naked allegation that fraud was not discovered until within three years prior to the filing of the suit has been held utterly insufficient in a long line of California cases.

Watkins v. Bryant, 91 Cal. 492, 27 Pac. 775;
Lady Washington Consolidated Co. v. Wood,
 113 Cal. 482, 45 Pac. 809;

Wilmans v. Weissman, 38 C.A. 693, 102 Pac. 2d 382;

Vertex Investment Company v. Schwabacher, 57 C.A. 2d 406, 134 Pac. 2d 891;

West v. Great Western Power Co., 36 C.A. 2d 403, 97 Pac. 2d 1014.

A complaint alleging only that the falsity of representations was not discovered until a certain date was insufficient.

Sacramento Suburban Fruit Lands Co. v. Lindquist, 39 Fed. 2d 900 (Certiorari denied by the Supreme Court of the United States, 282 U.S. 853, 51 S. Ct. 31, 75 L. Ed. 756.)

See to the same effect:

Sides v. Sides, 119 C.A. 2d 349, 259 Pac. 2d 708;
Cragge v. White, 113 C.A. 2d 356, 248 Pac. 2d 193;

Lewis v. Security-First National Bank of Los Angeles, 58 C.A. 2d 827, 137 Pac. 2d 864;

Seeger v. Odell, 18 Cal. 2d 409, 115 Pac. 2d 977, 136 A.L.R. 1291;

Jackson v. Master Holding Corp. 16 Cal. 2d 824, 108 Pac. 2d 673;

Gibson v. Rath, 13 C.A. 2d 40, 55 Pac. 2d 1219.

It would be like carrying coals to Newcastle to cite further decisions in support of a rule so long and so well settled. The allegation of the trustee's claim heretofore quoted is wholly insufficient to avoid the bar of the statute of limitations and, accordingly, the referee obviously had no jurisdiction to proceed to hear and determine a claim outlawed upon its face.

IV.

THE PROCEEDINGS BY THE TRUSTEE ARE BARRED BY THE FINAL JUDGMENT OF THE STATE COURT IN AN ACTION BETWEEN THE BANKRUPT AND TRIEBER WHICH WAS AN ACTION BETWEEN THE SAME PARTIES FOR THE SAME CAUSE.

The complaint filed in the action in the state Court is set forth *in haec verba* as an exhibit to the return of Trieber to the order to show cause. (TR 26-41.)

The separate defense of the trustee, claiming damages and demanding the turnover of \$40,675.28 to the trustee appears at pages 9 to 18 of the Transcript.

Let us consider, at the outset, the allegations of the two pleadings as they stand side by side.

Paragraphs I and II of each set forth the corporate capacity of the bankrupt corporation, Gayne Sales Co., Inc. and the fact that it was originally organized as Arian Gayne and Associates.

Paragraph III sets forth the names of the incorporators, to wit, I. E. Arian, Jerome R. Gayne and Samuel Gayne, and states that at all the times referred to the incorporators were directors of the corporation and that Trieber was also a director.

Paragraph IV of the Trustee's defense is identical with Paragraph VI of the Second Amended Complaint. The only distinction between the two documents at this juncture is in the order in which they are set forth.

The resolution referred to in Paragraph VI of the Second Amended Complaint is preceded by allegations as to certain representations alleged to have been made

by Trieber at the meeting at which the resolution was adopted; whereas in the trustee's defense, the alleged representations are set forth after the resolution.

To state the matter otherwise,—in one pleading it is set forth that the directors of the corporation adopted a resolution and that the resolution was adopted because of alleged representations made by Trieber, in the other, it is alleged that Trieber made the representations and that the resolution was adopted in reliance thereon. They certainly stand not upon the order of their going.

Paragraph VI of the trustee's defense and paragraph VII of the complaint both recite the filing of an application for the issuance of 400 shares with the Commissioner of Corporations and Paragraphs VII of the trustee's defense and paragraph VIII of the second amended complaint each recite the approval of the application by the Commissioner.

We may add that Paragraph VII of the defense and Paragraph IX of the second amended complaint each contains allegations that Joseph A. Brown was appointed escrow holder for all of the stock to be issued by the corporation and that this appointment was approved by the Commissioner.

In Paragraph VIII of the first and Paragraph X of the second pleading, there are recitals that on or about the 30th day of April Trieber represented to the directors and officers of the corporation that he had delivered to the said corporation merchandise of a reasonable value of \$15,675.28, \$6,708.18 against the stock

to be issued to Samuel Gayne, and \$8,967.10 in payment of the stock to be issued to Morris Trieber and that in reliance upon the said representations the corporation issued certain shares of stock to the persons therein named. The numbers of these certificates are set forth in each of the pleadings.

In Paragraph IX of the defense and Paragraph XI of the complaint, there are allegations to the effect that the representations made by Trieber were false, fraudulent and untrue and there is in the trustee's defense the naked allegations, repeatedly held to be insufficient (see *Lady Washington Consolidated Gold Mining Co. v. Wood*, 113 Cal. 482; *Galusha v. Fraser*, 178 Cal. 653; *Original Mining and Milling Co. v. Casad*, 210 Cal. 71; *Mortimer v. Loynes*, 74 C.A. 2d 160, and other decisions heretofore cited), that the discovery of the falsity of the representations was made within three years prior to the commencement of the action. Then in each case follow allegations of actual and punitive damages.

How any factual distinction can be drawn between the allegations of the two pleadings beggars our comprehension.

The law is well settled in California that a judgment of dismissal on the sustaining of a demurrer is *res judicata* on the identical factual issues. This rule is stated in the quite recent case of *Keidatz v. Albany*, 39 Cal. 2d 826, 249 Pac. 2d 264. This has apparently been the law ever since *Robinson v. Howard*, 5 Cal. 429, decided in 1855, in which it is stated by Justice Heydenfeldt that a judgment upon demurrer is a bar to sub-

sequent action "when it determines the whole merit of the case," and the opinion proceeds to say:

"Here the averment of the answer shows that the demurrer went to the validity of the contract which gave rise to the claim, and this averment is found to be true as alleged, by the judge at *nisi prius*, upon inspecting the record of the case."

The same rules are stated with extensive discussion of authorities in *Goodard v. Security Title Insurance and Guarantee Co.*, 14 Cal. 2d 47, commencing at page 51, in which it is stated that a judgment given after the sustaining of a general demurrer on a ground of substance may be deemed a judgment on the merits and conclusive in a subsequent suit.

In *Erganian v. Brightman*, 13 Cal. App. 2d 696, 57 Pac. 2d 971, the Court says at page 700:

"A judgment upon an order sustaining a demurrer constitutes a trial on the merits when an issue of law raised by the demurrer is heard and ruled upon by the Court. If leave to amend is granted, it must be taken advantage of, and if it is not, a plaintiff finds himself in the same position as if a demurrer were sustained without leave to amend."

In the paragraph preceding this language the Court says:

"And a judgment upon the sustaining of a demurrer to the complaint for failure to state a cause of action is a bar to a subsequent action setting up the same facts."

In *Freeze v. Salot*, 122 Cal. App. 2d 561, 266 Pac. 2d 140 (hearing denied by the Supreme Court), affirming

a judgment entered on an order sustaining a demurrer without leave to amend, the Court said that in determining the validity of a plea in *res judicata* the pertinent question is whether the issue decided in the prior adjudication was identical with the one presented in the action in question.

In the recent case of *Crowley v. Modern Faucet Manufacturing Co.*, 44 Cal. 2d 321, 282 Pac. 2d 33, the Supreme Court affirmed a judgment dismissing an action upon the ground that a prior judgment sustaining a demurrer without leave to amend was *res judicata* and that the plaintiff "was in fact seeking to re-litigate the precise issue that was finally adjudicated against him in the former action," and thus that "the trial Court properly exercised its power to stop vexatious litigation, clearly without merit, and burdensome to the Courts as well as to defendants."

CONCLUSION.

It is respectfully submitted that the order appealed from should be reversed and the cause remanded to the District Court with directions to dismiss the proceedings instituted by the appellee, and to discharge the order to show cause issued by the Referee in Bankruptcy.

Dated, San Francisco, California,
August 10, 1956.

JOSEPH A. BROWN,
Attorney for Appellant.

No. 15,134

IN THE

United States Court of Appeals
For the Ninth Circuit

MORRIS TRIEBER,

Appellant,

vs.

JOHN O. ENGLAND, Trustee in Bank-
ruptcy of the Estate of Gayne Sales
Co., Inc., a Corporation, Bankrupt,
Appellee.

APPELLANT'S PETITION FOR A REHEARING

(Or, If a Rehearing Be Denied, for a
Stay of the Mandate).

JOSEPH A. BROWN,

DeYoung Building, San Francisco 4, California,

*Attorney for Appellant
and Petitioner.*

FILED

OCT 1 1956

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
I. The statute is clear and unambiguous, and there is no room, therefore, for judicial construction thereof.....	2
II. A rehearing should be granted and the decree of the District Court reversed because of the importance of the jurisdictional question involved and the hardship which will be inevitably suffered by appellant.....	4
Conclusion	5

Table of Authorities Cited

Cases	Page
Cline v. Kaplan, 323 U.S. 97, 67 S.Ct. 155, 89 L.Ed. 97.....	5
Daniel v. Guaranty Trust Co., 285 U.S. 154, 52 S.Ct. 326, 78 L.Ed. 675	5
Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944, 92 L.Ed. 1207, 10 A.L.R. 2d 921	4
Maggio v. Zeitz, 33 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476.....	5
Rules	
Rules of the Supreme Court of the United States, Rule 19, subdivision (b)	2
Texts	
82 C. J. S. 577-583	3

No. 15,134

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MORRIS TRIEBER,

Appellant,

VS.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a Corporation, Bankrupt,
Appellee.

APPELLANT'S PETITION FOR A REHEARING

**(Or, If a Rehearing Be Denied, for a
Stay of the Mandate).**

*To Honorable William Denman, Chief Judge, and
Honorable Albert Lee Stephens and Honorable
Frederick G. Hamley, Circuit Judges:*

The petitioner in this cause respectfully prays Your Honors to grant a rehearing of the order and decree made by Your Honors herein dismissing the appeal.

The order of dismissal is made upon the sole ground that this Court lacks jurisdiction to review the order of the referee in bankruptcy and the order of the

District Court granting the motion to dismiss appellant's objections to the summary jurisdiction.

It is respectfully submitted that the decision of Your Honors falls within the provisions of Rule 19, subdivision (b) of the Rules of the Supreme Court of the United States, in this, that this Court has rendered a decision in conflict with the decisions of other courts of appeals and has so far sanctioned such a departure by a lower court as to call for the exercise of the Supreme Court's power of supervision unless a rehearing be granted.

We respectfully submit that Your Honors have committed error in dismissing the appeal upon each of the grounds set forth in Division I of the Argument set forth in Appellant's Opening Brief, pages 22-34, inclusive.

In addition thereto, we respectfully direct the attention of Your Honors to the following:

I.

THE STATUTE IS CLEAR AND UNAMBIGUOUS, AND THERE IS NO ROOM, THEREFORE, FOR JUDICIAL CONSTRUCTION THEREOF.

In the jurisdictional statement in Appellant's Opening Brief, we set forth the statute in *haec verba*. We set it forth again:

“2. The jurisdiction of this Court upon appeal to review the order in question: Title 11, Section 47, United States Code:

“*Jurisdiction of Appellate Courts:*

“(a) The United States Courts of Appeals, in vacation, in chambers, and during their

respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in *proceedings* in bankruptcy, *either interlocutory or final*, and in *controversies* arising in proceedings in bankruptcy to review, affirm, revise or reverse, both in matters of law and in matters of fact.”

We submit that the emphasized language of the statute clearly refutes the statement of this Court:

“The order is concededly interlocutory in nature. It follows that this court lacks jurisdiction to review such order.”

It is submitted that the language of the statute in clear and no uncertain words confers jurisdiction of this appeal upon this Court, and as the Court cannot assume jurisdiction which it does *not* possess, it likewise cannot *refuse* jurisdiction which it *does* possess.

The elementary rule of statutory construction has been stated in a legion of cases:

“Where the language of a statute is plain and unambiguous, there is no occasion for construction * * * An unambiguous statute must be given effect according to its plain and obvious meaning, and such unambiguous statute cannot be extended beyond its plain and obvious meaning, or restricted to, or confined in operation within, narrower limits or bounds than manifestly intended by the legislature.”

82 C.J.S. 577-583, and 20 columns of decisions cited in footnotes.

Thus the Supreme Court of the United States in *Ex parte Collett*, 337 U.S. 55, 69 S.Ct. 944, 92 L.Ed. 1207, 10 A.L.R. 2d 921, repeats the rule as follows:

“The plain words or meaning of a statute cannot be overcome by legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. *Gemsco v. Walling*, 324 U.S. 244, 260, 65 S.Ct. 605, 614, 89 L.Ed. 921. This canon of construction has received consistent adherence in our decisions.”

II.

A REHEARING SHOULD BE GRANTED AND THE DECREE OF THE DISTRICT COURT REVERSED BECAUSE OF THE IMPORTANCE OF THE JURISDICTIONAL QUESTION INVOLVED AND THE HARDSHIP WHICH WILL BE INEVITABLY SUFFERED BY APPELLANT.

These matters we have pointed out at length in Appellant's Opening Brief. If this dismissal is allowed to stand, it merely means that appellant, regardless of the ultimate outcome of the proceedings before the referee and in the District Court, will be compelled to try once again an action for damages both compensatory and exemplary in a summary proceeding, without a jury, and in which he has already prevailed in the state court. The fees of the referee, of attorneys, of shorthand reporters will be large and the delay will be protracted into months—perhaps even into years. In the event of an adverse decision by the referee, the process will be repeated

in the District Court. If that Court upholds the summary and arbitrary jurisdiction of a referee to usurp the functions of a jury in actions of law, we must again undergo the expense of an appeal to this Court.

We submit that no litigant should be subjected to such harassment in a case where it clearly appears from the numerous decisions cited in the briefs of appellant that the referee lacks jurisdiction to make the turnover order prayed for by the appellee. (*Daniel v. Guaranty Trust Co.*, 285 U.S. 154, 52 S.Ct. 326, 78 L.Ed. 675; *Cline v. Kaplan*, 323 U.S. 97, 67 S.Ct. 155, 89 L.Ed. 97; *Maggio v. Zeitz*, 33 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476.)

CONCLUSION.

Appellant, therefore, respectfully petitions Your Honors for a rehearing; and, in the event that a rehearing be denied, for a stay of the mandate of this Court, to permit appellant to petition the Supreme Court of the United States for a writ of certiorari.

Dated, San Francisco, California,

October 3, 1956.

JOSEPH A. BROWN,

*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for a rehearing is well founded, both in law and in fact, and that it is not interposed for delay.

Dated, San Francisco, California,

October 3, 1956.

JOSEPH A. BROWN,

*Counsel for Appellant
and Petitioner.*

No. 15138

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR THOMAS LELLES, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

APPELLANT'S BRIEF

JEFFREY HEIMAN, ESQ.

Attorney for Appellant

530, 1411 Fourth Ave. Bldg.
Seattle 1, Washington.

FILE

NOV -1 195

No. 15138

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR THOMAS LELLES, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

APPELLANT'S BRIEF

JEFFREY HEIMAN, ESQ.

Attorney for Appellant

530, 1411 Fourth Ave. Bldg.
Seattle 1, Washington.

CONTENTS

Page

Statement of Case.....	3
Statement Of Points to Be Relied On In Appeal.....	5
Argument On Point 1.....	13
Argument On Points 2 and 3.....	20
Argument On Points 4, 5 and 6.....	7
Argument On the Law.....	18

CASES CITED

<i>Breon vs. U. S.</i> , 74 Fed. (2nd) 4.....	18
<i>Davis vs. U. S.</i> , 160 U. S. 469.....	18
<i>U. S. vs. Klass</i> , 166 Fed. (2nd) 373.....	20
<i>Lilienthals Tobacco Co. vs. U. S.</i> , 97 U. S. 237.....	18
<i>Potter vs. U. S.</i> , 155 U. S. 438.....	18

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR THOMAS LELLES, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The Cultured Mushroom Industries, Inc., a corporation, and Arthur Thomas Lelles, an individual, were charged in two counts of an indictment with violation of the Federal Food, Drug and Cosmetic Act, charging them both with unlawfully causing to be introduced and delivered for introduction into inter-state commerce at Seattle, Washington, in count one, a delivery to Leon, State of Iowa, consigned to Charles L. Imhoff, a number of cartons containing food. They then allege

that the food was adulterated within the meaning of 21 U.S.C. 342 (a) (3), in that it consisted in part of a filthy substance by reason of the presence in said food of insect larvae and insect fragments. The indictment then alleges in count One that on August 7, 1950, the said Cultured Mushroom Industries, Inc. and Arthur Thomas Lelles, were convicted in this court of the violation of the Federal Food, Drug and Cosmetic Act and that said conviction had become final before the violation alleged was committed.

Count Two charges both the Cultured Mushroom Industries, Inc., a corporation, and Arthur Thomas Lelles with the same violation consisting of a shipment to Eau Claire, State of Wisconsin, consigned to Ted R. Fitzl a number of cartons containing food which it is alleged were adulterated. The second count likewise repeats that on August 7, 1950, the Cultured Mushroom Industries, Inc. and Arthur Thomas Lelles were both convicted of violation of the Federal Food, Drug and Cosmetic Act, which conviction had become final before the violation hereinbefore alleged was committed.

The verdict of the jury was that both the Cultured Mushroom Industries, Inc. and Arthur T. Lelles were guilty of Count One and Count Two of the indictment.

At the conclusion of the Government's case the de-

fendants each for themselves moved the court for an order of dismissal, challenged the legal sufficiency of the evidence, and asked the court to direct a verdict of "not guilty." The same motion was made at the conclusion of the defendants' case. The Court in each instance denied the motions.

A motion for a new trial was made (Tr. 8); the Court denied the motion for a new trial but (Tr. 9) the Court granted judgment of acquittal as to the defendant, Cultured Mushroom Industries, Inc. but denied the motion of the defendant, Arthur T. Lelles as an individual for a new trial. The defendant was then found guilty by the Court and sentenced to 18 months on Count One of the indictment and 18 months on Count Two of the indictment. The execution of the sentence imposed on Count Two to be concurrent with and not consecutive to the execution of the sentence imposed on Count One. A fine likewise of \$1,000.00 on each count was imposed (Tr. 11).

The defendant gave notice of appeal (Tr. 12) and the matter is now before this Court.

STATEMENT OF POINTS TO BE RELIED UPON IN APPEAL

The defendant urges the following points in appeal of the decision of the lower Court.

1: The motion to dismiss the indictment should have been sustained on the ground of variance between allegation in said indictment and the proof.

2: The Court erred in allowing the Government to call the witness Shallit on rebuttal and testify to taking of samples and then allowed, over objection of defendant's attorney, witness Elliott on rebuttal to testify to an analysis of certain samples taken by Shallit. That the testimony of these two witnesses offered for the first time on rebuttal was error. It was also improper on rebuttal to call witness Wallace who testified on rebuttal over objections duly taken by defendant.

3: It was error on the part of the Court to allow the witness Wallace to testify on rebuttal that the exhibits being marked with Codes No. 102 and No. 103 were not the same products that were examined by the Food and Drug Department in 1950 and approved. That said objection is based upon the fact that the answer to that question was for the jury to decide and was improper on rebuttal.

4: That it was error for the Court to submit to the jury the question of liability of the Cultured Mushroom Industries, Inc., and the question of the liability of Mr. Arthur Thomas Lelles as an individual on the grounds that there was not sufficient evidence presented to allow the matter to go to the jury. That even though the

Court later sustained a motion to dismiss as to the Cultured Mushroom Industries, Inc., it was error to submit the case as to the corporation and individual to the jury.

5: The Court should have sustained the challenge of the defendant to the legal sufficiency of the evidence and directed a verdict of Not Guilty.

6: There was a misjoinder of parties defendant.

ARGUMENT ON STATEMENT OF POINTS

4, 5 AND 6

It is respectfully urged that there was not sufficient evidence as to the defendant, Arthur Thomas Lelles, to allow this matter to go to the jury. The court should have entered an order of dismissal at the conclusion of the Government's case and at the conclusion of the defendants' case; and that, even though the Court later sustained a motion to dismiss as to the Cultured Mushroom Industries, Inc., it was error to submit the case as to the corporation and as to the individual to the jury.

On the question of the insufficiency of the evidence we wish to call to the Court's attention the testimony of Mr. Wallace, a Government witness. He testified that he examined certain cans which were turned over to him as having been shipped by the defendant (Tr.

26). He said it contained filthy matter (Tr. 24 and 25). These cans were not introduced in evidence. He then identified the defendants' exhibit A-1, which was a copy of a report made by this very witness dated April 20, 1950, concerning lots 102 and lots 103 (Tr. 27). Then the Government stipulated (Tr. 27) that Mr. Wallace, their witness, a Government chemist, analyzed samples of Cultured Mushroom salt taken from Mr. Lelles' premises in 1950, being lots 102 and lots 103, and found them free of filth or beetle or larvae fragments.

It must be noted that this witness did not examine any of the contents of any of the cans introduced into evidence as plaintiff's 1 and 3 to determine whether they were filthy (Tr. 28). His testimony was with reference to an analysis of other cans than those that were introduced in evidence. His very words were "I analyzed Cultured Mushroom salt which was in different cans than those which are here" (Tr. 26). The Court's attention is called to the fact that all this mushroom salt was marked with code numbers and the same witness, on direct testimony, testified that in 1950 he examined these codes and found them to be O.K. The Government gave the defendants the right and permission to sell this mushroom salt after examination and then later arrested him for doing it. Witnesses were then called by the Government to establish the fact that

the cans now in evidence were taken from the various purchasers and that they had received them in interstate shipment with which we had no quarrel.

The Government witness, Baukin, on direct examination testified to a visit at the plant at 2954 Admiral Way wherein he made an inspection of the premises (Tr. 39). He testified that he was advised by the secretary, not Mr. Lelles, that the shipments upon which this indictment were based were made on that information this indictment was founded. He further testified on page 47 that the information with reference to the shipments which were made were given to him voluntarily.

After the corporate records were introduced the plaintiff rested its case. The challenges and motions were properly made for dismissal of the action. Obviously as to the defendant, Cultured Mushroom Industries, Inc., the action should have been dismissed at once, because the record showed that the shipment was made in the name of another corporation, the Washington Mushroom Industries; that the payment was made to the Washington Mushroom Industries, Inc, and the Cultured Mushroom Industries, Inc. did not have anything to do with the matter of this shipment. The Court, however, saw fit to let the matter go to the jury at that point.

The Government's position was, and it had to be sus-

tained because the indictment alleged that the Cultured Mushroom Industries, Inc. and Mr. Lelles made a shipment, that Mr. Lelles was the head of the Cultured Mushroom Industries, Inc. and therefore was responsible as well as being an officer and head of the company, and that the corporation was responsible. Now, it should follow that if the corporation was found Not Guilty, or rather dismissed by the Court, then the officer performing a function for said corporation should likewise be found Not Guilty, and that the matter should not be submitted to the jury when the officer or general manager of the corporation, as charged in the indictment, is not guilty. If the indictment had alleged that a shipment was made, as it was made, by the Washington Mushroom Industries, Inc., and if they were the ones that collected the money, that made the shipment and violated the law, and that Mr. Lelles, an officer of the company, made or directed it to be made, and then if the jury found both the corporation and Mr. Lelles guilty, there would be no quarrel with the decision. But in this case Mr. Lelles was charged as an individual and as an officer of the corporation and the corporation was charged. The Court decreed that the corporation was not responsible, therefore it should follow that the officer of the corporation is not responsible because he is not charged as an officer of the Washington Mushroom Industries, Inc., the concern that actually made the shipment.

At this point in the evidence, there has been no testimony which shows that the exhibits introduced here in evidence were filthy substances or that they contained filthy and putrid matter and in violation of the law. The evidence at this point only shows that samples taken from a shipment not introduced in evidence but other samples, not the ones marked for exhibit and offered in evidence, contained matter in violation of the law. The record likewise discloses at this point that said exhibits were part of a stock of merchandise which had been previously approved by the Government's own witness.

On the matter of variance and sufficiency of the proof to submit the matter to the jury, this Court's attention is called to the allegation in the indictment which charges both defendants with having shipped on or about February 10, 1955, (Tr. 3). The Court's attention is likewise called to the fact that (Tr. 39) the inspector, Baukin came to the plant on February 7th or February 8th, 1955, 3 or 4 days before the date on which the actual shipment is alleged to have taken place, and at that time he testified (Tr. 39) that he was given the information about the shipment made, as alleged in the indictment, on February 10th. Obviously he could not have been given the information at that time and there is a mistake of some kind, either in the date of the indictment or in the date when he

made the visit to the plant; but whatever the mistake is, it is a mistake made by the Government and no motion was made at any time by Government counsel to have the indictment correspond with the proof. It is appreciated that an allegation "on or about" gives the Government certain variation, but also it is maintained that where the entire case rests upon the testimony of one witness, Mr. Baukin, who contradicted his testimony, as will be shown in later argument, his testimony must be viewed in the most favorable light as far as the defendant is concerned, and if that is done there is not sufficient evidence upon which to have submitted the case to the jury or even require the defendant to offer proof. Especially is this true when the wrong corporation was obviously charged with the offense.

Again the Court's attention is called to the fact that at this point, the conclusion of the Government's case, the cans examined were not introduced in evidence. A reading of the record of the direct testimony on the part of the Government of the United States must disclose to the reader that there was not sufficient evidence to allow this case to proceed any farther, because of the variance and because of the fact that the evidence disclosed that the only witness who examined any of the shipment did not introduce any of the matter examined into evidence, and that the actual cans

introduced into evidence were part of a code number which had been previously examined by a Government witness in 1950 according to his own testimony and found to be perfect shipment. At that state in the record the Court should have dismissed the indictment as against both defendants.

ARGUMENT ON POINT ONE

With reference to the first point relied upon, the motion to dismiss the indictment should have been sustained on grounds of variance between the allegation in the indictment and the proof. It is submitted that an examiner's report getting information on February 7th or 8th, 1955, that a shipment was made as alleged on February 10, 1955, is an impossible situation and that the evidence is in such complete variance that the action should have been dismissed.

In the statement of points to be relied upon in appeal, points 2 and 3 cover the matter of allowing witnesses to testify the first time on rebuttal concerning certain facts. This Court's specific attention is called to the fact that on page 43 of the transcript, the Court asked the witness the following question: "Have you given us the full conversation that was requested? Have you given the full conversation that was requested as best you can recall it? The answer of the witness was "Yes." Mr. Baukin was recalled on re-

buttal (Tr. 70). He was asked by Mr. Roberts, Assistant United States Attorney, whether or not on the very day that he testified to before, February 7th or February 8th, 1955, he had a conversation with Mr. Lelles about current production of cultured mushroom salt. This question was objected to (Tr. 71) as being improper rebuttal. Over objection he was allowed to testify (Tr. 72 & 73). He testified that in his direct testimony he did not relate all of the conversation he had with Mr. Lelles at that time. It will be remembered that the Court asked him (Tr. 42) whether or not that was the entire conversation, the conversation that he related on direct examination, and he answered "Yes." Now, on rebuttal he was allowed to testify to additional matters not included in his first statement on direct examination. It will be observed that in the transcript (p. 73) he states that the particular point that he had reference to in his previous testimony was reference to interstate shipment, that that was the entire conversation with reference to said subject matter. If this Court will look at the transcript, pages 42 and 43, it will be observed that the subject matter brought up there was not interstate shipment but preparation of mushroom salt. All that one has to do is to read the record and we find that it was error, highly prejudicial to the defendants, to allow the witness Baukin, on rebuttal to bring out new matter concern-

ing the manufacture by Mr. Lelles of some mushroom salt and especially is this error when, on direct examination by the Court, not by either counsel but by the Court, as to whether or not what he had stated on direct examination was all the information that he had and a complete answer to the question and he answered "Yes" that it was the complete conversation. And now, dealing with exactly the same subject matter on page 73 of the transcript, he details an entirely different conversation on rebuttal for the first time.

The motion to strike should have been granted. (Tr. 73). It will be noted (Tr. 74) that on cross-examination the witness said "The discussion I was referring to yesterday (Tr. 43) was one in regard to shipments." Obviously a reading of the transcript (Tr. 43) shows that it was not a conversation with regard to shipments but was one with regard to the manufacture of mushroom salt.

Now on rebuttal again for the first time witnesses Elliott (Tr. 78) over the objection of defense counsel, and witness Wallace (Tr. 84), over the objection of counsel, on rebuttal testified to the contents of these exhibits, establishing what should have been established as the Government's case in chief. After the government had rested its case, the defense had a right to believe that the evidence upon which conviction was

sought was the evidence introduced in case in chief, and for the Government to be allowed on rebuttal to bring out new testimony and new evidence with reference to the subject matter introduced in evidence in the first instance is improper rebuttal. It was likewise improper for the Government to have Mr. Wallace, a witness on rebuttal (Tr. 87) venture an opinion as to whether the samples purportedly coming from lots 102 and 103, which were obtained in 1955, were the same as the ones that were examined in 1950. That was a matter for the jury to determine and not for Mr. Wallace. Exception was taken to the Court's ruling allowing Mr. Wallace to testify that in his opinion these were different. The Court should have stricken the testimony.

The Court erred in allowing the matter to go to the jury. As to the question whether the Court should have allowed the matter of liability of Cultured Mushroom Industries, Inc. and the defendants to go to the jury, this Court's attention is called to the transcript, page 94, wherein the Court itself says: "It seems to me while it may be true, there doesn't seem to be anything in the evidence to indicate that they caused (interrupted by counsel)", and then the Court said "Well I think it's pretty weak. However, I will reserve ruling on that defendant until later and denied as to the individual".

The jury found both Cultured Mushroom Industries, Inc. and A. T. Lelles guilty. It is respectfully submitted that by the Court's submission or allowing to be submitted to the jury the question of the liability of Cultured Mushroom Industries, Inc. and A. T. Lelles individually, then the jury finding both guilty they may have concluded as the evidence disclosed that Mr. Lelles was an officer of Cultured Mushroom Industries, Inc. and if they so concluded that he was an officer of the corporation and that the corporation was guilty of having shipped the merchandise and he as an officer having been guilty of directing it or causing it to be shipped, then when the Court later dismissed the Cultured Mushroom Industries, Inc. from liability and dismissed them from the action, finding the corporation not guilty, it should likewise follow that the defendant Lelles is not guilty because the jury had submitted to it the question of the liability of Mr. Lelles as an individual and the Government proved he was an officer of the very corporation that was later dismissed from this action. That will be shown by the cases hereinafter submitted. This matter was highly prejudicial to the defendant A. T. Lelles. If the Court had sustained the motion as he should have done, to the corporation, and merely submitted the matter as to A. T. Lelles, then we would have another question for this Court.

ARGUMENT ON THE LAW

It was the duty of the Government to prove the charge, by evidence that satisfies beyond a reasonable doubt, that the defendants were guilty of the charge.

Lilienthals Tobacco Co. vs. U. S., 97 U. S. 237.

Potter vs. U. S., 155 U. S. 438

Davis vs. U. S., 160 U. S. 469

Many other cases to the same effect are cite in the case of *George A. Breon & Co., Inc. vs. U. S.* (CCA, 8th Circ.) 74 Fed (2d) 4, where the court reversed the District Court.

If the shipment was made by the Washington Mushroom Industries, and that is what the trial Court found by dismissing the corporate defendant, Cultured Mushroom Industries, Inc., there was not any proof that the defendant Lelles, acting as an officer of Washington Mushroom Industries or individually caused, authorized or directed the shipment. The shipment was made, as the evidence discloses, by Washington Mushroom Industries, Inc. The Government sought to prove that it was made by Cultured Mushroom Industries, Inc. While it was true Lelles was President of both companies, it is also true that if the Government's evidence was to be believed, and the jury so did, then the verdict is inconsistent.

The acts complained of were committed, as alleged

by the Government and proven by the Government to the jury's satisfaction, by agents of the Cultured Mushroom Industries, Inc.

This Court's special attention is called to the wording of the indictment (Tr. 3). Mr. Lelles is charged as "an individual at the time President of said corporation". This same language is repeated in both counts. The words "at the time President of the corporation" is descriptive of the individual charged. It should follow that if the corporation of which this individual is President did not make the shipment, and the Court so found by dismissing the action, then its President is not guilty.

To find the defendant, Arthur T. Lelles, guilty because he was President of another company which did in fact make the shipment is charging him with another offense not pleaded in the indictment. The Government argued that he was the President and, therefore, responsible, but their argument should fail when the Court decides that the corporation should be dismissed.

Since the Court's decision did not come until after the jury found both defendants guilty, we can but conclude that the jury decided that the corporation was guilty and that its President was guilty as well because he was the President and as such was responsible for

its acts. If the acts are not to be considered, and that is what the trial Court's dismissal amounts to, then the acts of its President should not be considered. For the Court to allow this verdict to stand as to the President and not the corporation would be a miscarriage of justice.

ARGUMENT ON POINTS 2 AND 3

The writer is aware of the rule 26 (Sec. 2185) that provides that the recalling of witnesses is ordinarily within the discretion of the trial Judge.

U. S. vs. Klass, 166 Fed. (2d) 373

It is our position that to allow a witness to open a new field of inquiry and to change his testimony after having testified in the Government's case in chief was an abuse of discretion. A reading of the rebuttal testimony reveals that the witness went into a new field of discussion: the manufacture by Lelles of mushroom salt. His conversation was most extensive on rebuttal and this Court is reminded that he is the same man that answered the trial Judge's question to the effect that he had on direct examination stated the entire conversation. Apparently there was an inspection of the plant and the conversation referred to what might very well be called another crime committed by the defendant.

CONCLUSION

It was error to allow the witness Wallace (Tr. 85) to testify on rebuttal re the contents of plaintiffs' exhibit 1; objections duly taken (Tr. 85), and it was error (Tr. 87), duly excepted to (Tr. 87), to allow the witness Wallace to testify that the salt shipped in 1955 was not the same that he examined in 1950 and approved. By allowing this testimony to stand and denying the defendant's motion to strike, duly made, the Court allowed the witness to speculate and venture an opinion on the very question that was exclusively in the province of the jury. He might just as well have expressed an opinion as to the defendant's guilt.

In view of the insufficiency of the evidence, the alleged error on rebuttal, all of which was duly excepted to, and the inconsistency of the verdict, it is respectfully submitted that the case should be reversed.

Respectfully submitted,

JEFFREY HEIMAN

Attorney for Appellant.

No. 15138

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

ARTHUR THOMAS LELLES,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLEE'S BRIEF

CHARLES P. MORIARTY
United States Attorney

JOHN A. ROBERTS, JR.
Assistant United States Attorney

1012 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

Attorneys for Appellee

ARTHUR A. DICKERMAN
Of Counsel

Department of Health, Education, and Welfare
1401 South Hope Street, Room 514
Los Angeles 15, California

No. 15138

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

ARTHUR THOMAS LELLES,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLEE'S BRIEF

CHARLES P. MORIARTY
United States Attorney

JOHN A. ROBERTS, JR.
Assistant United States Attorney

1012 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

Attorneys for Appellee

ARTHUR A. DICKERMAN
Of Counsel

Department of Health, Education, and Welfare
1401 South Hope Street, Room 514
Los Angeles 15, California

INDEX

	Page
I. STATEMENT OF JURISDICTION.....	1
II. STATEMENT OF FACTS.....	2
III. STATUTORY PROVISIONS INVOLVED.....	11
IV. QUESTIONS PRESENTED.....	12
V. SUMMARY OF ARGUMENT	
A. The Judgment of the District Court Must Be Sustained If There Is Substantial Evidence to Support It.....	12
B. The Evidence Which Supports the Judgment of the District Court Is Not Only Substantial But Overwhelming	13
C. Defendants' Motion at Close of Government's Evidence Was Waived.....	14
D. The Government's Rebuttal Evidence Was Properly Admitted.....	15
E. There Is No Fatal Variance in This Case.....	16
F. There Was No Misjoinder of Parties Defendant Nor Error in Submission of Entire Case to Jury	16
VI. ARGUMENT	
A. The Judgment of the District Court Must Be Sustained If There Is Substantial Evidence to Support It.....	17
B. The Evidence Which Supports the Judgment of the District Court Is Not Only Substantial But Overwhelming	18
C. Defendants' Motion at Close of Government's Evidence Was Waived.....	23
D. The Government's Rebuttal Evidence Was Properly Admitted	25

INDEX (Continued)

ii
Page

E. There Is No Fatal Variance in This Case..... 35

F. There Was No Misjoinder of Parties Defendant
Nor Error in Submission of Entire Case to Jury 37

VII. CONCLUSION 41

TABLE OF CASES

<i>Adelman v. United States</i> , 216 F. 2d 541 (C.A. 9, 1954)....	18
<i>Berg v. United States</i> , 176 F. 2d 122 (C.A. 9, 1949), cert. den. 338 U.S. 876.....	37
<i>Bridgman v. United States</i> , 183 F. 2d 750 (C.A. 9, 1950)..<	40
<i>Carney v. United States</i> , 163 F. 2d 784 (C.A. 9, 1947), cert. den. 332 U.S. 824.....	36
<i>Cornes v. United States</i> , 119 F. 2d 127 (C.A. 9, 1941).....	32
<i>Eastern Transportation Line v. Hope</i> , 95 U.S. 297 (1877)..<	34
<i>Frankfeld v. United States</i> , 198 F. 2d 679 (C.A. 4, 1952), cert. den. 344 U.S. 922.....	35
<i>Gaunt v. United States</i> , 184 F. 2d 284 (C.A. 1, 1950), cert. den. 340 U.S. 917.....	24
<i>Henderson v. United States</i> , 143 F. 2d 681 (C.A. 9, 1944)....	18
<i>Johnson v. United States</i> , 318 U.S. 189 (1943).....	41
<i>Ledbetter v. United States</i> , 170 U.S. 606 (1898).....	36
<i>Lelles v. United States</i> , 120 F. 2d 447 (C.A. 9, 1941).....	22
<i>Lii v. United States</i> , 198 F. 2d 109 (C.A. 9, 1952).....	23
<i>Marron v. United States</i> , 8 F. 2d 251 (C.A. 9, 1925).....	32
<i>Pasadena Research Laboratories, Inc. v. United States</i> , 169 F. 2d 375 (C.A. 9, 1948), cert. den. 335 U.S. 853.....	18, 33

ii	TABLE OF CASES (<i>Continued</i>)	Page
<i>Riley v. United States</i> , 225 F. 2d 558 (Apps. D.C., 1955) ..		34
<i>Rowland v. United States</i> , 207 F. 2d 621 (C.A. 9, 1953)		24
<i>Samish v. United States</i> , 223 F. 2d 358 (C.A. 9, 1955), cert. den. 350 U.S. 848		32
<i>Smith v. United States</i> , 180 F. 2d 775 (Apps. D.C., 1950) ..		38
<i>Travelers Ins. Co. v. Drake</i> , 89 F. 2d 47 (C.A. 9, 1937)		35
<i>Triangle Candy Co. v. United States</i> , 144 F. 2d 195 (C.A. 9, 1944)		5
<i>United States v. Calderon</i> , 348 U.S. 160 (1954)		23
<i>United States v. Chiarella</i> , 184 F. 2d 903 (C.A. 2, 1950) ..		31
<i>United States v. Crowe</i> , 188 F. 2d 209 (C.A. 7, 1951)		31
<i>United States v. Dotterweich</i> , 320 U.S. 277 (1943)		39
<i>United States v. Griffin</i> , 176 F. 2d 727 (C.A. 3, 1949), cert. den. 338 U.S. 952		39
<i>United States v. Johnson</i> , 319 U.S. 503 (1943)		35
<i>United States v. Kolodny</i> , 149 F. 2d 210 (C.A. 2, 1945)		35
<i>Woodard Laboratories, Inc. v. United States</i> , 198 F. 2d 995 (C.A. 9, 1952)		17

STATUTES

18 U.S.C. 3231	2
21 U.S.C. 331(a)	1, 11
21 U.S.C. 333(a)	1, 10, 11
21 U.S.C. 335	25
21 U.S.C. 342(a) (3)	11, 33
21 U.S.C. 372(b)	5
28 U.S.C. 1291	2

FEDERAL RULES OF CRIMINAL PROCEDURE

	Page
Rule 7(e)	36
Rule 8(b)	37
Rule 14	38
Rule 29(a)	23
Rule 29(b)	39

REFERENCE

Cyclopedia of Federal Procedure (3rd Ed.) Vol. 11, pp. 440-441	38
---	----

No. 15138

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

ARTHUR THOMAS LELLES,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

The Indictment in this case alleged that the defendants caused the interstate shipments of adulterated food at Seattle, Washington, within the jurisdiction of the District Court. (R. 3-5).

Pursuant to 21 U.S.C. 331(a), 21 U.S.C. 333(a),

and 18 U.S.C. 3231, the District Court had jurisdiction to try this case.

Under 28 U.S.C. 1291, this Court has authority to review the judgment of the District Court.

II

STATEMENT OF FACTS

On September 28, 1955, a two-count Indictment was filed in this case. (R. 3-6). The Indictment named Cultured Mushroom Industries, Inc., and Arthur Thomas Lelles as defendants in both counts, and charged them with violating the Federal Food, Drug, and Cosmetic Act by causing adulterated food to be introduced into interstate commerce. More specifically, the Indictment charged that the food involved consisted in part of a filthy substance by reason of the presence therein of insect larvae and insect fragments.

The defendant Cultured Mushroom Industries, Inc., is a corporation organized in 1940 under the laws of the State of Washington. (Plaintiff's Ex. 10; see also R. 57). It does business at 2954 Admiral Way, Seattle, Washington. (R. 48). It is controlled and managed by defendant Arthur Thomas Lelles who is its president. (R. 48, 57; Plaintiff's Ex. 10).

Mr. Lelles also controls, manages, and is the president of the Washington Mushroom Industries,

Inc., a Washington corporation formed in 1949. (Plaintiff's Ex. 11 and 9; R. 48, 57). This firm does business at the same address as the Cultured Mushroom Industries, Inc. (R. 47-48, 57).

Mr. Lelles controls 98 out of 100 shares of stock in both corporations; only 2 qualifying shares in each firm are held by other persons. (R. 48, 61).

It was certified by the Secretary of State of the State of Washington that both corporations were in good standing with all fees paid to June 30, 1956. (Plaintiff's Ex. 10 and 11).

On February 7 and 8, 1955, Food and Drug Inspector Baukin inspected the plant of Cultured Mushroom Industries, Inc., at 2954 Admiral Way, Seattle, and had a series of conversations with defendant Lelles concerning the product Cultured Mushroom Salt. (R. 39). At first, Mr. Lelles denied that he had shipped Cultured Mushroom Salt in interstate commerce. (R. 41). A few minutes later, Inspector Baukin again inquired of Mr. Lelles about shipments of Cultured Mushroom Salt. (R. 41). This time, Mr. Lelles turned to a lady employee and said, "Give him those two shipments." (R. 41). That employee then informed Inspector Baukin that 2 dozen shaker cans were sent to Mr. Charles Imhoff, Leon, Iowa, on January 22, 1955, and that 6 dozen shaker cans were sent to Mr.

Ted Fitzl, Eau Claire, Wisconsin, on January 24, 1955. (R. 43).

On February 18, 1955, Food and Drug Inspector Southworth called on said Mr. Imhoff at his home in Leon, Iowa. (R. 30). In the early or middle part of February, 1955, Mr. Imhoff had received from Washington Mushroom Industries, Inc., Seattle, Washington, 2 cartons each containing 12 shaker cans of Cultured Mushroom Salt. (R. 32). Except for removing the outer wrapper to see if what he had ordered was all there, Mr. Imhoff had not disturbed the cartons or opened any of the shaker cans. (R. 33).

Inspector Southworth purchased 12 of these shaker cans from Mr. Imhoff, taking 6 cans from each carton and placing the 12 cans in one of the cartons. (R. 30). With the shaker cans were a number of leaflets, some secured to the cans by means of rubber bands, and some loose. (R. 31).

Inspector Southworth identified all of the shaker cans and leaflets, as well as the display carton with the Sample No. 10-067 M, the date 2/18/55, and his initials, H. R. S. (R. 31). He did not in any way disturb the contents of the individual shakers. (R. 31). He placed the entire sample — display carton, shaker cans, and leaflets — in a fiber carton, sealed the fiber carton with an official Food and Drug seal identified

as "10-067 M, February 18, 1955, Harold R. Southworth", and mailed it to the Seattle District of the Food and Drug Administration. (R. 31).

Food and Drug Chemist William W. Wallace, of the Seattle District office, received this sample with the seals intact. (R. 20-21). In analyzing the sample for filth, he used up the contents of 4 cans. (R. 21-22, 27). He also set aside 4 cans for Mr. Lelles if Mr. Lelles wanted them for his own analysis.¹ (R. 27-28, 87). The remaining 4 cans of this sample were introduced in evidence. (Plaintiff's Ex. 1A, 1B, 1C, 1D). Also in evidence is the display carton which Inspector Southworth obtained from Mr. Imhoff. (Plaintiff's Ex. 1).

On March 28, 1955, Food and Drug Inspector Vinz called on the aforesaid Mr. Ted Fitzl at his residence in Eau Claire, Wisconsin. (R. 34). Toward the end of January, 1955, Mr. Fitzl had received from Washington Mushroom Industries, Inc., Seattle, Washington, 6 display cartons each containing 12 cans of Cultured Mushroom Salt. (R. 37).

Inspector Vinz obtained 12 of these cans from Mr. Fitzl, taking 4 cans out of each of 3 display cartons,

¹ Under 21 U.S.C. 372(b), the defendants had a right to be provided with a part of the official samples, upon request. *Triangle Candy Co., et al v. United States*, 144 F. 2d 195, 198-199 (C.A. 9, 1944).

(R. 34). Mr. Fitzl had never touched any of these cans. (R. 38). Inspector Vinz also obtained a display carton from Mr. Fitzl. (R. 34). A leaflet was attached to each can by a rubber band. (R. 34).

Inspector Vinz wrapped and sealed the items comprising this sample, identifying the sample by the date 3/28/55, the sample number 10-565 M, and his signature, George L. Vinz. (R. 36). He never disturbed the contents of the shakers. (R. 36). The next day he mailed the sample to the Seattle District of the Food and Drug Administration. (R. 36).

Food and Drug Chemist Wallace, of the Seattle District office, received this sample with the seals intact. (R. 23). In analyzing the sample for filth, he used up the contents of 3 cans. (R. 23, 27-28). He also set aside 3 cans for Mr. Lelles.² (R. 28). The remaining 6 cans of this sample were introduced in evidence. (Plaintiff's Ex. 3A, 3B, 3C, 3D, 3E, 3F). Also in evidence is the display carton which Inspector Vinz obtained from Mr. Fitzl. (Plaintiff's Ex. 3).

Mr. Wallace has been employed as a chemist with the Food and Drug Administration for over 16 years. (R. 19). His specialty has been the analysis of foods for filth. (R. 19). Essentially, his examination con-

² See footnote 1.

sists of two procedures: (1) the separation of the filth from the food and (2) the identification of the filth particles. (R. 20). The methods which he used have been known and used for many years. (R. 21, 25).

With respect to Sample No. 10-067 M, the basis for Count I of the Indictment, he examined 4 cans and testified that his findings were as follows (R. 20, 22):

- Can No. 1— 28 whole larva or equivalent larva and large beetle fragments 1 - 2 millimeters across
140 microscopic fragments 1/10 to 1 millimeter across
- Can No. 2— 15 whole larva or equivalent
6 large larva or beetle fragments
120 smaller fragments
- Can No. 3— 24 whole larva or equivalent
3 larger larva fragments
98 smaller fragments
- Can No. 4— 12 whole larva or equivalent
4 large fragments of larva or beetle
93 smaller fragments

With respect to Sample No. 10-565 M, the basis for Count II, he examined 3 cans and testified that his findings were as follows (R. 23-24):

- Can No. 1— 50 whole larva or equivalent
4 large insect fragments about 1 millimeter
210 microscopic fragments of larva or beetle
2 5-millimeter rat or mouse hairs

Can No. 2— 42 whole larva or equivalent
 6 large fragments of larva or beetle
 232 smaller fragments

Can No. 3— 46 whole larva or equivalent
 306 smaller fragments of larva or
 beetle

Mr. Wallace made photographs of some of the insect fragments which he observed under the microscope. In the photographs, the particles are magnified 71 times. (R. 25). Plaintiff's Exhibit 5 is a photograph which relates to some of his findings on Sample No. 10-067 M. (R. 24). Plaintiff's Exhibit 6 is a photograph which relates to some of his findings on Sample No. 10-565 M. (R. 25). Insects in food are classified as filth. (R. 26).

The defense in this case was based entirely upon Mr. Lelles' assertion that the Cultured Mushroom Salt involved in Counts I and II was manufactured in 1941 (R. 58) and found free from filth by the Food and Drug Administration in 1950. (R. 58-59, 27, Defendants' Ex. A-1).

The rebuttal evidence established that the following differences existed between the mushroom salt which had been examined by the Food and Drug Administration in 1950 and the samples examined in the present case:

<i>1950 Samples</i>	<i>Present Samples</i>
(1) No appreciable filth (R. 79)	(1) Substantial filth (R. 22-24)
(2) Appreciable amount of <i>corn</i> starch (R. 79-81)	(2) A few grains of starch—not enough to permit identifica- tion as corn starch. (R. 82-83, 86)
(3) Net weight per can —.90 oz. (Defend- ants' Ex. A-1)	(3) Net weight per can —from 1.63 oz. to 1.83 oz. (R. 21, 23)
(4) Headspace per can— 2 $\frac{3}{4}$ in. to 3 $\frac{5}{16}$ in. (R. 79-80)	(4) Headspace per can— 1 $\frac{3}{8}$ in. to 1 $\frac{5}{8}$ in. (R. 85)

Food and Drug Inspectors Baukin and Lipera testified that during a factory inspection of February 7 and 8, 1955, Mr. Lelles stated he had made between four and five hundred pounds of mushroom salt in the "last few months". (R. 73, 75). Mr. Lelles also told them that the composition of the mushroom salt he was then manufacturing consisted of one pound of ground, dried mushrooms and nine ounces of salt, with nothing else in it. (R. 73). In the mushroom salt which he manufactured in 1941, he had added corn starch to prevent caking. (R. 62-64).

On February 28, 1956, the jury found both defendants guilty as charged in Count I and Count II of the Indictment. (R. 6).

It was then stipulated by the parties that on August 7, 1950, the defendants, Cultured Mushroom Industries, Inc., and Arthur Thomas Lelles, had been convicted on a plea of guilty of violating the Federal Food, Drug, and Cosmetic Act.³ (R. 7).

On March 21, 1956, the District Court granted the motion of defendant Cultured Mushroom Industries, Inc., for a judgment of acquittal and denied the motion of defendant Lelles for a new trial. (R. 9-10).

On March 21, 1956, the District Court entered a judgment finding the defendant Lelles to be guilty as charged, convicting him, and sentencing him to 18 months imprisonment on Count I and to 18 months imprisonment on Count II, the execution of sentence on Count II to be concurrent with the execution of sentence on Count I. The Court also imposed a fine of \$1,000 on each count. (R. 11).

On March 21, 1956, defendant Lelles filed a Notice of Appeal. (R. 12-13). On the same day, the District Court approved a \$5,000 cash bond permitting the defendant Lelles to be at liberty during the pendency of the appeal. (R. 13-15).

³ Under 21 U.S.C. 333(a), such a prior conviction subjected the defendants to the imposition of a heavier penalty.

III

STATUTORY PROVISIONS INVOLVED

Federal Food, Drug, and Cosmetic Act:

"21 U.S.C. 342. Adulterated Food.

"A food shall be deemed to be adulterated—

"(a) (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; . . ."

"21 U.S.C. 331. Prohibited Acts.

"The following acts and the causing thereof are hereby prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

"21 U.S.C. 333. Penalties—Violation of Section 331.

"(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine."

QUESTIONS PRESENTED

(1) Is there substantial evidence in the record to support the judgment of the District Court convicting defendant Lelles?

(2) Was there prejudicial error in admitting the rebuttal testimony of Elliott and Wallace?

(3) Was there a fatal variance between the Indictment and the proof?

(4) Was there prejudicial error in submitting the entire case to the jury?

V

SUMMARY OF ARGUMENT

A. *The Judgment of the District Court Must Be Sustained If There Is Substantial Evidence to Support It.*

Appellant challenges the sufficiency of the evidence upon which he was convicted. This Court will not reweigh the evidence, and the judgment of the District Court must be sustained if there is substantial evidence to support it, taking the view most favorable to the Government.

B. *The Evidence Which Supports the Judgment of the District Court Is Not Only Substantial But Overwhelming.*

Appellant Lelles manufactures and distributes Cultured Mushroom Salt. His business activities are conducted through two corporations — Washington Mushroom Industries, Inc., and Cultured Mushroom Industries, Inc., — which he controls and manages. He is president of both firms.

Early in 1955, he caused the two interstate shipments of Mushroom Salt involved in this case to be made in the name of Washington Mushroom Industries, Inc.

The Food and Drug Administration obtained and examined samples of these shipments. Such analyses by an experienced chemist revealed extensive insect infestation in the products.

Defendants offered no analytical evidence. Their defense was that the 1955 shipments came from old stocks of Mushroom Salt which the Food and Drug Administration had examined in 1950 and found free from filth.

In rebuttal, the Government produced scientific data which established that the 1955 shipments could not have come from the stocks it had examined in 1950. The Government also showed that Lelles had produced

between 400 and 500 pounds of Mushroom Salt shortly before the 1955 shipments were made, and that his 1950 stocks had been depleted by November of 1954.

Lelles had been convicted of a felony. The jury could disregard his testimony as self-serving and untrue, and place credence in the impressive testimony produced by the Government.

The conviction of Lelles is supported by substantial evidence of the most compelling character.

C. Defendant's Motion at Close of Government's Evidence Was Waived.

At the close of the Government's case in chief, both defendants moved the District Court to dismiss the Indictment and direct a verdict of not guilty. The District Court denied this motion. Defendants then introduced evidence. At the close of all the evidence, defendants renewed this motion. Again it was denied.

By introducing evidence, defendants waived their first motion. Only the second motion may be considered on appeal so that the sufficiency of the evidence is measured by all of the evidence and is not limited to the evidence in the Government's case in chief.

D. *The Government's Rebuttal Evidence Was Properly Admitted.*

The Government's rebuttal testimony disproved the defense and was therefore properly rebuttal rather than part of the Government's case in chief. It brought out the distinguishing scientific characteristics of the 1950 and the 1955 samples, and demonstrated that the two sets of samples could not have come from the same stock. The rebuttal testimony also disproved Lelles' assertion that he had not manufactured substantial amounts of Mushroom Salt just before the 1955 shipment.

The admission of rebuttal testimony is within the sound discretion of the District Court. In the absence of abuse of discretion, the Court may even allow evidence in rebuttal which could or should have been offered in chief. There was no abuse of discretion, the Court even allowing defendants to introduce their own rebuttal testimony at the close of the Government's rebuttal.

Opinion evidence of an expert chemist that the two sets of samples could not have come from the same stock was properly admitted. This opinion did not deal with an ultimate issue in the case. Furthermore, opinion evidence is not inadmissible merely because it is offered on an ultimate issue.

There was no prejudicial error in any of the Government's rebuttal testimony.

E. There Is No Fatal Variance In This Case.

Count I alleged that an interstate shipment of Mushroom Salt was made "on or about February 10, 1955." The evidence showed that the shipment was made prior to that date, perhaps as much as 19 days earlier.

This is not a fatal variance. The charge of a date in this Indictment is not a material allegation which must be proved as laid.

F. There Was No Misjoinder of Parties Defendant Nor Error in Submission of Entire Case to Jury.

The two defendants were properly joined in this Indictment. Lelles did not object to this joinder at any stage in the District Court. He has therefore waived his right to make such an objection.

The conviction of Lelles is not inconsistent with the acquittal of the corporate defendant. Nor was Lelles prejudiced by the submission of the entire case to the jury.

The acquittal of the corporate defendant is a "false quantity" in the consideration of the sufficiency of the evidence to support the guilty verdict as to

Lelles. A verdict of guilty as to one defendant is not invalidated by acquittal of a co-defendant even if there is some inconsistency.

The evidence in support of the conviction of Lelles is substantial.

VI

ARGUMENT

A. *The Judgment of the District Court Must Be Sustained If There Is Substantial Evidence to Support It.*

Lelles was found guilty on both Counts by the jury and was convicted on both Counts by the Judgment of the District Court. He now challenges the sufficiency of the evidence upon which he was convicted. Under such circumstances, the function of this Court is clear.

In *Woodard Laboratories, Inc. v. United States*, 198 F. 2d 995 (C.A. 9, 1952) this Court said at page 998:

“The usual rule to be followed in determining the sufficiency of evidence to sustain a judgment is well settled. ‘It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.’ *Glasser v. United States*, 1942, 315 U.S. 60, 80 . . .”

See also *Adelman v. United States*, 216 F. 2d 541, 543 (C.A. 9, 1954).

And in *Henderson v. United States*, 143 F. 2d 681 (C.A. 9, 1944), this Court observed at page 682:

“It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution . . .”

See also *Pasadena Research Laboratories, Inc. v. United States*, 169 F. 2d 375, 380 (C.A. 9, 1948), cert. den. 335 U.S. 853.

The entire tenor of appellant's brief, insofar as it deals with the sufficiency of the evidence, is to the effect that this Court should reweigh the evidence “in the most favorable light as far as the defendant is concerned” (Appellant's Brief 12), and emerge with conclusions different from those of the jury and the District Court. Manifestly, appellant misconceives the function of this Court.

B. *The Evidence Which Supports the Judgment of the District Court Is Not Only Substantial But Overwhelming.*

In our Statement of Facts, we have shown that defendant Lelles controlled and managed two corpora-

tions, Cultured Mushroom Industries, Inc., and Washington Mushroom Industries, Inc. (R. 57). Under the name of Washington Mushroom Industries, Inc., he caused the interstate shipments of the Cultured Mushroom Salt involved in this case. (R. 41-43, 57, 61, 32, 37).

That the samples in evidence (Plaintiff's Exhibits 1, 1A-1E, 3, and 3A-3F) were obtained from the purchasers who had received them in interstate commerce is not disputed by the appellant. (Appellant's Brief 8-9).

To support the charge that this Mushroom Salt was adulterated by reason of the presence of insect larvae and insect fragments, the Government presented the testimony of William W. Wallace, an experienced chemist who had analyzed a portion of the samples of the Mushroom Salt in question. The details of his analytical data are set forth above in our Statement of Facts. Mr. Wallace's testimony clearly established extensive insect infestation in the products. (R. 22-25).

Noteworthy is the failure of the defendants to introduce any analytical evidence to refute the Government's evidence that these samples were adulterated. As required by statute and regulations,⁴ a por-

⁴ See footnote 1.

tion of the official samples had been set aside for the defendants.

Appellant's argument that the Government "did not introduce any of the matter examined into evidence" (Appellant's Brief 12) is a specious one. Chemist Wallace selected representative cans for analysis and the analytical procedure consumed the contents of the cans he examined. (R. 27-28, 21-22). He preserved the filth portion of those contents (R. 28) and was able to testify as to his findings.

The only defense urged against the adulteration charges was that in 1950, nearly five years before the acts complained of in the Indictment, the Food and Drug Administration had examined certain codes of defendant's Mushroom Salt and had found some of those codes to be free from filth. Defendant Lelles asserted that the Mushroom Salt involved in the present case had been taken from the codes found to be free from filth in 1950. (R. 58-60), Defendants' Ex. A-1).

Even if what Mr. Lelles stated were true, it would not be a defense to the positive findings of substantial quantities of filth in the 1955 shipments. Nevertheless, if it were true that in making these shipments he was relying in good faith upon the Government's analytical data of 1950, there would be considerable mitigation

which might be considered in imposing sentence. As a practical matter, if there were any sound basis for the defense argument, the Government would have moved to dismiss the Indictment.

However, as shown in our Statement of Facts, the Government produced rebuttal testimony which conclusively established that the samples in the present case were not from the lots which had been found free from adulteration in 1950. Scientific data revealed such distinguishing characteristics as cornstarch content, headspace, net weight, and the presence or absence of filth. (R. 79-87, 21-23, Defendants' Ex. A-1). In addition, the credible evidence showed that defendant Lelles had manufactured between 400 and 500 pounds of Mushroom Salt during the period of a few months preceding the shipments in question. (R. 73-75). It was also shown that on March 4, 1953, Lelles had approximately 50 cases (72 shakers in each case) of Mushroom Salt on hand (R. 68); that on November 3, 1954, there appeared to be less than 1 dozen shakers of the Mushroom Salt on his premises (R. 69-70); but that on January 1, 1955, there were approximately 100 cases on his premises (R. 53, 55).

When it is also recalled that the destruction of adulterated Mushroom Salt in 1950 left Mr. Lelles with a large number of empty shaker cans (R. 51);

that the shakers themselves were not coded (R. 64); that Mr. Lelles had been sending out one-shaker samples from the lots found free from filth in 1950 (R. 68-69) and that this practice left him with empty display cartons bearing the code numbers of those lots—the jury could properly have inferred that Mr. Lelles had manufactured the Mushroom Salt in question late in 1954 or early in 1955; that he had filled the old empty shaker cans with this product; that those cans still retained a few grains of the cornstarch which was an ingredient of the Mushroom Salt that had been destroyed in 1950; and that he had placed those cans in the empty display cartons bearing the code numbers of the lots found free from filth in 1950.

Mr. Lelles admitted that he had been convicted of a felony⁵ in 1939 (R. 67) and the jury could properly have discounted his testimony regarding the identity of the Mushroom Salt in this case as self-serving and untrue, especially in the light of the impressive rebuttal testimony produced by the Government.

The judgment of the District Court convicting the defendant, we submit, is supported by substantial evidence of the most compelling character.

⁵ His conviction of using the mails to defraud was affirmed by this Court. *Lelles v. United States*, 120 F. 2d 447 (C.A. 9, 1941).

C. Defendant's Motion At Close of Government's Evidence Was Waived.

At the close of the Government's evidence in chief, defendants moved the District Court to dismiss the Indictment and direct a verdict of not guilty. (R. 49). Under Rule 29(a) of the Federal Rules of Criminal Procedure, such motions during trial have been abolished and motions for judgment of acquittal have been substituted therefor. See *Lii v. United States*, 198 F. 2d 109, 112 (C.A. 9, 1952).

The District Court denied this motion. (R. 50). Thereafter, the defendants offered evidence which the court received. (R. 50-67, 88-91). By so doing, defendants waived that motion, assuming that the motion may be considered a motion for a judgment of acquittal.

In *United States v. Calderon*, 348 U. S. 160 (1954), the Supreme Court stated at page 164, footnote 1:

"By introducing evidence, the defendant waives his objections to the denial of his motion to acquit . . . His proof may lay the foundation for otherwise inadmissible evidence in the Government's initial presentation . . . or provide corroboration for essential elements of the Government's case . . ."

Much of appellant's brief is devoted to the assertion that the District Court should have dismissed

the Indictment at the conclusion of the Government's case. (Appellant's Brief 7-13). But defendant's motion at that stage in the trial is not subject to review on appeal since defendant waived it by offering evidence after its denial. *Rowland v. United States*, 207 F. 2d 621, 622 (C.A. 9, 1953).

While defendant renewed his motion at the close of all the evidence, he is asking this Court to review and weigh the evidence piecemeal — as of the close of the Government's case in chief and as of the close of all the evidence. A comparable situation arose in *Gaunt v. United States*, 184 F. 2d 284 (C.A. 1, 1950), cert. den. 340 U. S. 917, where the Court said at page 290:

“At the outset, it must be pointed out that the defendant by offering evidence on his own behalf elected to abandon his motion for acquittal made at the close of the Government's case and to rely upon a subsequent motion to the same effect made at the close of all the evidence . . . which he made, so that this later motion is the only one for consideration on this appeal. *Hence the sufficiency of the evidence as a whole to establish the defendant's wilfulness must be considered, not merely the sufficiency of the evidence offered by the Government alone on that issue.*”
(Emphasis added).

Consequently, we submit that this Court should disregard all of appellant's arguments with respect to the denial of the motion he made at the close of the Government's case in chief, though a study of the evi-

dence at that stage discloses an overwhelming sufficiency in support of the trial court's ruling.

D. *The Government's Rebuttal Evidence Was Properly Admitted.*

Even before this case went to trial, the Government knew what the defense would be since Mr. Lelles had volunteered the same defense in May of 1955 in an administrative hearing under 21 U.S.C. 335 where he was accorded an opportunity to show cause why he should not be prosecuted. (R. 90-91).

Intimation that this defense would actually be offered at the trial came during the cross-examination of the Government's first witness, Mr. Wallace. At that point, defense counsel asked Mr. Wallace to identify a report which is part of Defendants' Exhibit A-1. (R. 26-27). Mr. Wallace readily identified this report as one he made on April 20, 1950, showing the results of analyses made by him at that time. (R. 26-27). To save time, Government counsel stipulated that Mr. Wallace had analyzed samples of Mr. Lelles' Cultured Mushroom Salt in 1950 and that Mr. Wallace had found Lots 102 and 103 to be free from filth at that time. (R. 27). It was expressly stated, however, that "*This stipulation relates only to the lots which were identified in 1950 as Lots 102 and 103.*" (R. 27).

In the direct examination of Inspector Baukin as part of the Government's case in chief, Government counsel inquired into conversations which Baukin had with Mr. Lelles on February 7 and 8, 1955, concerning Lelles' preparation of Mushroom Salt "at that time". (R. 42-45). After a series of questions on this point which were not answered because defense counsel objected and the Court sustained the objections, the following colloquy took place between the Court and Government counsel (R. 44-45):

"The Court: Are you seeking, or anticipating the Defendant's defense here?

"Mr. Roberts: Certainly, your Honor.

"The Court: It seems to me that that is rebuttal.

"Mr. Roberts: I am only taking the Court's time at this point, your Honor, because I feel that the defense was allowed to bring in what I felt was their case in chief.

"The Court: What they brought out could have been impeachment testimony of your witness.

"Mr. Roberts: That is correct.

"The Court: Impeachment is not a defense necessarily. I mean, it is a defense, of course, in that it breaks down the Government's case; but it is permissible to break down the Government's witness.

"Mr. Roberts: That is, of course, true your Honor."

Counsel then refrained from further effort to intro-

duce rebuttal testimony during the Government's case in chief.

When the defense presented their case in chief, they offered testimony through defendant Lelles and several of his employees that the Mushroom Salt involved in this case was manufactured in 1941 (R. 58); that it was a part of three lots—Lots 101, 102, and 103 (R. 58-59); that examination by the Food and Drug Administration and the City Sanitation Department in 1950 revealed that Lot 101 was spoiled (R. 58); that a City Inspector then segregated the lots and destroyed Lot 101 but left Lots 102 and 103 (R. 59); that there was no other Mushroom Salt on the premises when the shipments in this case were made (R. 60); that these shipments were taken from either Lot 102 or Lot 103 (R. 60); that Mr. Lelles did not tell Inspector Baukin that he had produced between 400 and 500 pounds of salt within a month prior to their conversations on February 7 and 8, 1955 (R. 66-67); and that there was no one with Mr. Baukin when they had that conversation (R. 67).

To rebut this defense, the Government then offered the testimony of five inspectors and two chemists. (R. 67-87). We have already described the substance of their testimony and the inferences which the

jury could properly draw. (Statement of Facts and Part B of Argument).

Appellant now challenges the admissibility of some of this rebuttal testimony, but his arguments are without substance.

With respect to the rebuttal testimony of Mr. Elliott and Mr. Wallace, appellant argues that their testimony established "what should have been established as the Government's case in chief." (Appellant's Brief 15). It is difficult to believe that this argument is offered seriously. Their testimony on rebuttal was offered for the sole purpose of contradicting the defense contention that the Mushroom Salt shipments in this case came from the Lots 102 and 103 which they had examined in 1950 and found free from filth. (R. 81-82). Mr. Elliott had examined samples of those lots in July of 1950. (R. 79). Mr. Wallace had examined samples of those lots in April of 1950. (R. 27; Defendants' Ex. A-1). As we have already shown, the rebuttal testimony of these chemists brought out the analytical data which clearly distinguished the 1950 samples from the 1955 samples.

The rebuttal testimony of Inspector Baukin, to which appellant also objects (Appellant's Brief 20), was intended to show admissions by defendant Lelles that he had manufactured Mushroom Salt shortly be-

fore the shipments in question. (R. 70-74). When Baukin testified in the Government's case in chief, he stated that during the inspection at the Lelles plant on February 7 and 8, 1955, he had a "series of conversations with Mr. Lelles." (R. 39). *He was then asked to describe any conversation he had with Mr. Lelles about current interstate shipments of Mushroom Salt.* (R. 40). His answer to that question was interrupted by several objections, arguments, and rulings. (R. 40-42). Mr. Baukin was then asked whether Lelles had told him how he was preparing Mushroom Salt at that time. (R. 42). Objection to that question was argued and sustained. (R. 42-43). At that point, the Court interrogated Baukin (R. 43):

"The Court: Have you given us the full conversation that was requested? Have you given the full conversation that was requested, as best you can recall it?

"The Witness: Yes."

When Baukin was recalled on rebuttal and asked to testify to conversations he had had with Lelles on February 7 and 8, 1955, regarding current production of Mushroom Salt, defense counsel objected on the ground that in his testimony in chief, Baukin stated he had given "the complete text of the conversation." (R. 71). After some argument, this objection was overruled. (R. 71-72). Mr. Baukin then explained

what conversation he had in mind when he answered the Court's question (R. 72):

"The discussion that I referred to as having been completed was relative to one particular point yesterday relating to interstate shipments."

Appellant now argues that "Obviously a reading of the transcript (Tr. 43) shows that it was not a conversation with regard to shipments but was one with regard to the manufacture of mushroom salt." (Appellant's Brief 15). Appellant presents a distorted version of what transpired. A reading of the Record from the bottom of page 39 through the middle of page 43, unequivocally shows that Baukin, just before answering the Court's question, had testified at some length concerning conversations with regard to *shipments of Mushroom Salt* but had heard the Court repeatedly sustain objections to questions about the *preparation of Mushroom Salt*. It was reasonable for Baukin to assume that the Court was referring to the conversation about which he *had* been permitted to testify, rather than to the conversation about which he *had not* been permitted to testify.

It will be recalled that when Government counsel several times attempted, during the Government's case in chief, to elicit testimony which would show that Mr. Lelles was manufacturing Mushroom Salt late in 1954 and early in 1955, defense counsel objected on the

ground that such testimony was "outside the issues of this case." (R. 42-44). The District Court sustained these objections and suggested that the Government not anticipate the defense. (R. 44-45).

Defendant, having clearly injected the "identity" issue into the case by his own testimony and having denied manufacturing Mushroom Salt within a few months of the 1955 shipments, could not properly object to the Government's rebuttal testimony which was offered to show (1) that the 1955 samples could not have come from the lots found free from filth in 1950, and (2) that the defendant in fact manufactured Mushroom Salt shortly before the shipments complained of in the Indictment.

In an analogous situation, *United States v. Chiarella*, 184 F. 2d 903 (C.A. 2, 1950), remanded to District Court for resentencing, 341 U.S. 946 (1951), the Court of Appeals said on page 907:

"On what theory an accused may complain that details of an occurrence were developed on redirect which he brought into the case on cross, we are not advised."

In *United States v. Crowe*, 188 F. 2d 209 (C.A. 7, 1951), the Court said at page 213:

"The function of rebuttal is to explain, repel, counteract or disprove adversary's evidence."

The admission of rebuttal testimony is within the sound discretion of the District Court, and in the absence of an abuse of discretion, the Court may even allow evidence in rebuttal which could or should have been offered in chief. In *Cornes v. United States*, 119 F. 2d 127 (C.A. 9, 1941), this Court said at page 130:

“Appellant contends that certain evidence which was offered in rebuttal, and was admitted, should have been excluded as not being proper rebuttal. Assuming, without deciding, that it was not proper rebuttal, it was nevertheless within the discretion of the Court to admit the evidence; and that discretion, in the absence of abuse, is not reviewable. *Goldsby v. United States*, 160 U.S. 70, 74 . . .”

See also *Marron v. United States*, 8 F. 2d 251, 257 (C.A. 9, 1925); *Samish v. United States*, 223 F. 2d 358, 365 (C.A. 9, 1955), cert. den. 350 U. S. 848.

Clearly, the testimony which the Government offered on rebuttal was proper rebuttal testimony. The District Court, which was eminently fair in the conduct of the trial, even permitted the defendants to introduce testimony in an attempt to rebut the Government's rebuttal testimony. (R. 88-91).

In Mr. Wallace's rebuttal testimony, he testified that in his professional opinion the 1950 samples of Mushroom Salt, identified as Lots 102 and 103, which he had analyzed could not possibly be the same Mush-

room Salt as the 1955 samples he analyzed. (R. 87). Appellant now argues that this was a matter for the jury to determine. (Appellant's Brief 16).

Mr. Wallace is an expert with specialized knowledge in the field of chemistry. He examined certain samples of Mushroom Salt in 1950 and other samples of Mushroom Salt in 1955. He was competent to testify that in his opinion the two sets of samples could not have come from the same stock. Such testimony did not invade the province of the jury.

In the first place, this testimony did not relate to any ultimate issue of fact. The ultimate issue was not whether the 1955 sample came from the same stock as the 1950 sample, but whether the 1955 sample was *adulterated* within the meaning of 21 U.S.C. 342(a)(3). In a similar situation under the Federal Food, Drug, and Cosmetic Act, where expert chemists testified that in their opinion the analytical data which they found in examining certain drugs reflected the condition of the drugs months prior to the time of their analysis, the admission of such testimony was sustained by this Court in *Pasadena Research Laboratories, Inc., v. United States*, 169 F. 2d 375 (C.A. 9, 1948), cert. den. 335 U.S. 853, the Court observing at page 385:

"This objection is not well grounded. A glance at the questions discloses that in none of them is there any reference to 'misbranding' or 'adulterating', which are the ultimate issues in this case . . .

"All these questions dealt with *supporting* or *evidentiary* facts, and not ultimate issues."

So here there is no mention of "adulteration" in the question addressed to Mr. Wallace or in his answer.

Furthermore, it is settled that the opinion of an expert witness is not inadmissible merely because it is offered on an *ultimate* issue as long as his opinion relates to matters within his "special competence and skill and not to matters of common knowledge and observation." *Riley v. United States*, 225 F. 2d 558, 559 (Apps. D.C., 1955). In *Eastern Transportation Line v. Hope*, 95 U. S. 297 (1877), the Court said at page 298 of questions asked a tug-boat pilot:

"The witness was an expert, and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class, which cannot be put to ordinary witnesses. *It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury.* As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify." (Emphasis added).

See also *United States v. Johnson*, 319 U. S. 503, 519-520 (1943); *Travelers Ins. Co. v. Drake*, 89 F. 2d 47, 49 (C.A. 9, 1937); *Frankfeld v. United States*, 198 F. 2d 679, 689 (C.A. 4, 1952), cert. den. 344 U.S. 922.

Noteworthy also because of its factual similarity to the present question is *United States v. Kolodny*, 149 F. 2d 210 (C.A. 2, 1945) where the defendant was prosecuted for the unlawful possession and sale of non-tax-paid liquor. On page 211, the Court said:

“Nor do we find prejudicial error . . . in the admission of Maple’s opinion testimony, based on his analysis of samples, that the spirits in the containers on the date of the arrest were not the same as had originally been placed in the containers by Commercial Solvents Corporation.”

Clearly an opinion as to the identity of two sets of samples, based upon scientific analytical data, is within the special competence and skill of an expert chemist.

We submit that there was no prejudicial error in the admission of any of the rebuttal testimony of which appellant complains.

E. *There Is No Fatal Variance In This Case.*

Count I of the Indictment charges that the defendants caused a certain violative interstate shipment to be made “on or about February 10, 1955.” (R. 3).

The evidence shows that this shipment was received through the mail by the consignee in Iowa "in the early or middle part of February, 1955." (R. 32). According to the records of the defendant, this shipment was made on January 22, 1955, or 19 days before the date alleged. (R. 43).

Appellant suggests that this was a significant variance and suggests that the Government somehow erred fatally in that "no motion was made at any time by Government counsel to have the indictment correspond with the proof." (Appellant's Brief 11-13). The Federal Rules of Criminal Procedure contemplate that only an Information may be amended on motion. (Rule 7(e)). An Indictment may properly be amended only by the Grand Jury. *Carney v. United States*, 163 F. 2d 784, 788 (C.A. 9, 1947), cert. den. 332 U.S. 824.

It has long been settled that proof that an offense was committed on a date other than alleged is not fatal to the prosecution. In *Ledbetter v. United States*, 170 U. S. 606 (1898), the Court said at page 612:

"Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient."

And in *Berg v. United States*, 176 F. 2d 122 (C.A. 9, 1949), cert. den. 338 U.S. 876, this Court observed at page 126:

“Even if it be true that the date alleged for the commission of a crime is not a true one or even a possible one, this does not invalidate the indictment. The charge of a date in an indictment is not a material allegation which must be proved as laid.”

Thus, we submit, there is no substance to the variance issue raised by appellant.

F. There Was No Misjoinder of Parties Defendant Nor Error In Submission of Entire Case to Jury.

Appellant seems to be suggesting that the District Court's Judgment of Acquittal as to the defendant Cultured Mushroom Industries, Inc., after both defendants were found guilty as charged by the jury, somehow establishes that there was a prejudicial misjoinder of parties. (Appellant's Brief 7, 10, 16-20).

Rule 8(b) of the Federal Rules of Criminal Procedure declares in part:

“Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.”

The Indictment in this case charges both defend-

ants with having participated in the same act constituting an offense in each count. Joinder of defendants was clearly authorized.

Rule 14 provides for relief from prejudicial joinder. No such relief was sought by appellant in the District Court before, during, or after the trial. Failure to object to joinder before trial constitutes a waiver. See *Cyclopedia of Federal Procedure* (3rd Ed.), Vol. 11, pages 440-441; *Smith v. United States*, 180 F. 2d 775 (Apps. D.C., 1950). Following the verdict of the jury and before the acquittal of the corporate defendant, both defendants moved for a new trial but the motion made no request for a severance of defendants. (R. 8). The "misjoinder" issue, we submit, was simply an afterthought.

Appellant complains that his conviction is inconsistent with the acquittal of the corporate defendant, and seems to suggest that he was prejudiced by the District Court's action in submitting the entire case to the jury. On page 17 of his brief, appellant says:

"If the Court had sustained the motion as he should have done, to the corporation, and merely submitted the matter as to A. T. Lelles, then we would have another question for this Court."

Appellant apparently believes that the subsequent acquittal of the corporation made mandatory his own acquittal.

At the close of all the evidence, both defendants moved for a directed verdict and for a dismissal of the Indictment. (R. 91). The Court denied the motion as to the individual defendant and reserved ruling as to the corporate defendant. (R. 94). After both defendants were found guilty by the jury (R. 6), the Court acquitted the corporation. (R. 7). A closely parallel situation was presented in *United States v. Griffin*, 176 F. 2d 727, 728 (C.A. 3, 1949), cert. den. 338 U. S. 952, and the defendant who was not acquitted claimed, as appellant does here, that he was prejudiced because the other defendant had not been acquitted *before* the case went to the jury. In a well-considered opinion, the Court dismissed this argument as without merit. The Court also pointed out that in reserving a decision on the motion, the trial court had acted in exact accordance with Rule 29(b) of the Federal Rules of Criminal Procedure.

The evidence plainly established Mr. Lelles' responsibility for the offenses alleged, regardless of whether he had acted in his capacity as president of defendant Cultured Mushroom Industries, Inc., or as president of the non-defendant Washington Mushroom Industries, Inc., or both. There was no fatal inconsistency in convicting Lelles and acquitting the corporate defendant. In a leading case under the Federal Food, Drug, and Cosmetic Act, *United States v. Dot-*

terweich, 320 U.S. 277 (1943), the jury had convicted Dotterweich but had disagreed as to the guilt of the corporation of which he was the president. Rejecting Dotterweich's argument, similar to appellant's here, the Supreme Court said at page 279:

"Equally baseless is the claim of Dotterweich that, having failed to find the corporation guilty, the jury could not find him guilty. Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries."

See also *Bridgman v. United States*, 183 F. 2d 750 (C.A. 9, 1950) where this Court said at page 753:

"Even if we assume that the verdicts were inconsistent, it is well settled that such inconsistency is not fatal to and does not invalidate verdicts of guilty . . .

"Moreover, acquittal of appellant's co-defendants 'is a false quantity in the consideration of' the sufficiency of the evidence to support the verdicts . . ."

We submit that there is no basis for appellant's assertion of misjoinder and error in the submission of the entire case to the jury.

VII

CONCLUSION

We submit that no prejudicial error was made in the Court below and that the District Court conducted the trial with conspicuous fairness. In view of appellant's assiduous search for flaws in the Record, we believe it appropriate to close this brief by quoting from the concurring opinion in *Johnson v. United States*, 318 U.S. 189, 202 (1943):

"In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution."

Respectfully submitted,

CHARLES P. MORIARTY

United States Attorney

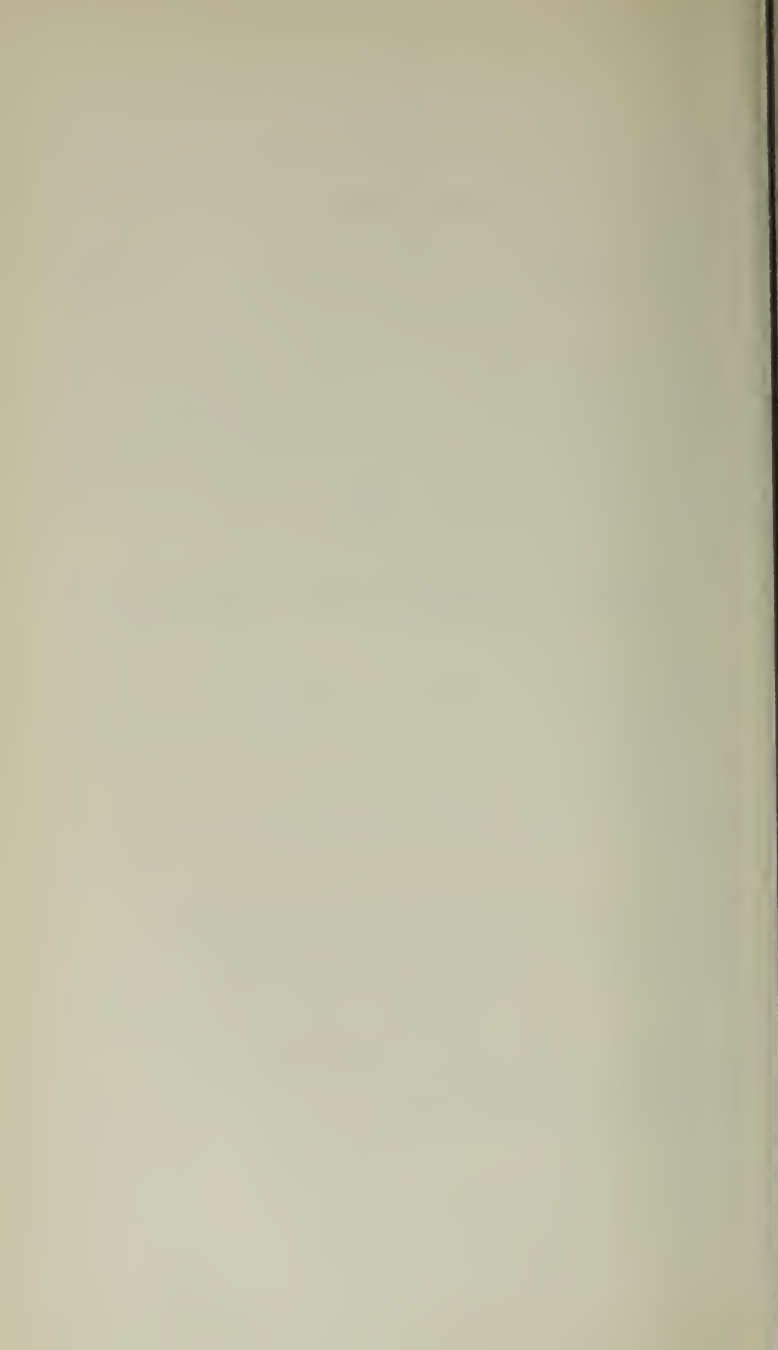
JOHN A. ROBERTS, JR.

Assistant United States Attorney

Attorneys for Appellee

ARTHUR A. DICKERMAN

Of Counsel



No. 15138

United States Court of Appeals
FOR THE NINTH CIRCUIT

A. T. LELLES, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

PETITION FOR RE-HEARING

BRIEF OF PETITIONER

JEFFREY HEIMAN
Attorney for Appellant

530, 1411 4th Ave. Bldg.
Seattle 1, Washington

FILED

MAR 9 1957

No. 15138

United States Court of Appeals
FOR THE NINTH CIRCUIT

A. T. LELLES, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

PETITION FOR RE-HEARING

BRIEF OF PETITIONER

JEFFREY HEIMAN
Attorney for Appellant

530, 1411 4th Ave. Bldg.
Seattle 1, Washington

United States Court of Appeals
FOR THE NINTH CIRCUIT

A. T. LELLES, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

PETITION FOR RE-HEARING

BRIEF OF PETITIONER

It is respectfully submitted on this petition for re-hearing that this Court did not take into consideration all of the evidence in affirming the decision of the District Court.

It is our position that the evidence shows that Mr. A. T. Lelles could not have, and did not, manufacture the Cultured Mushroom Salt prior to 1950 in code numbers 102 and 103, and that when examined in 1950 and in subsequent years said product was approved by the United States Food & Drug Department.

The shipment made was lots 102 and 103 (Tr. 26).

Mr. William W. Wallace testified that in 1950 he examined lots 102 and 103 (Tr. 27) and signed a

report which was introduced in evidence and marked Exhibit A1 (Tr. 26). The government stipulated that according to the analysis made in 1950 there was nothing wrong with the Cultured Mushroom Salt and it could be shipped (Tr. 27).

Mr. William G. Lillas testified that he made the shipment in question, from which this indictment grew, and he said he shipped from lots 102 and 103, which were there before he started to work for the corporation (Tr. 52).

Mrs. May Isabel Moore testified that she had been working for the corporation since 1952 (Tr. 54) and she was familiar with lots 102 and 103.

"To my knowledge we did not have any other finished Cultured Mushroom Salt in cans for shipment other than Lot 102 and Lot 103 during the months of January and February 1955." (Tr. 55; italics supplied)

She also stated (Tr. 56) that there was only enough mushroom salt made in the hand experimental grinder to fill one shaker.

"I do not know that there was any Cultured Mushroom Salt from a hand experimental grinder on the premises during January and February, 1955. The hand experimental grinder was used temporarily, experimenting to make new products, not to make Cultured Mushroom Salt."

Mr. Lelles testified as to lots 102 and 103. The Food

& Drug Department had come into the office a number of times to take samples of this salt (Tr. 59) and never complained about the quality.

All the Cultured Mushroom Salt on the premises were from Lot 102 and 103. (Tr. 60; italics supplied)

He did not have the machinery to manufacture mushroom salt until March 22, 1955 (Tr. 60).

It is our contention that from the above cited evidence there is no question but that the shipment made was a product approved by the Food & Drug Department.

This Court, in its opinion (page 7) cited the testimony of the rebuttal witness who testified as an expert that in his opinion the Cultured Mushroom Salt analyzed in 1955 and in 1950 were different products. This Court then cited in the margin of the opinion the reasons. The reasons he gave, aside from the filth, are:

(2) 1950 samples had an appreciable amount of cornstarch, and the 1955 samples had only a few grains of cornstarch.

This substantiates the Appellant's position. He (A. T. Lelles) testified (Tr. 62) that the product of the Cultured Mushroom Salt that was analyzed in 1950 by William W. Wallace of the U.S. Food & Drug Department, was Cultured Mushroom Salt that was

manufactured prior to the year 1950. At that time several hundreds of cases of Cultured Mushroom Salt were manufactured with cultivated mushrooms and salt. Short time after the few hundreds of cases were manufactured, it was discovered that the Cultured Mushroom Salt was caking up in the shakers and it would not flow freely out of the shakers.

Then he (A. T. Lelles) went to the U.S. Food & Drug Department in Seattle and saw and talked to Mr. Rowe, who at that time was the head man of the Seattle office for the U.S. Food & Drug Department, and explained to Mr. Rowe that the Cultured Mushroom Salt that was manufactured with cultivated mushrooms and salt was caking up and would not flow freely out of the shakers.

After the conference Mr. Rowe advised him to mix some cornstarch with the cultivated mushrooms and the salt, and that the cornstarch would prevent the hard caking up and that the Cultured Mushroom Salt would flow freely out of the shakers.

On the advice of Mr. Rowe, cornstarch was added into the cultivated mushrooms and salt, and there was manufactured additional several hundreds of cases of Cultured Mushroom Salt. So the first several hundred of cases were manufactured without cornstarch

and the other several hundred cases were manufactured with cornstarch. All this happened prior to 1950.

William W. Wallace testified that the Cultured Mushroom Salt that he analyzed in 1950 (Tr. 84) had cornstarch in it. This is true, because it was from the lot that had cornstarch in it. The samples that William W. Wallace analyzed after February 1955 had no cornstarch in it because that lot was manufactured first without cornstarch, and the other was manufactured with cornstarch in it upon the advice of Mr. Rowe from the U. S. Food & Drug Dept.

Also the variation in the head space fill of the can shakers claimed by William W. Wallace, correctly comes about like this: The Cultured Mushroom Salt that had cultivated mushrooms, salt and cornstarch after the product was put in the shakers, because it is heavier in gravity than just cultivated mushrooms and salt, it settles and packs down in the shakers and it makes the head space fill of the shakers look less filled than the shakers that contained cultured mushroom salt made just with cultivated mushrooms and salt, and that is what Mr. William W. Wallace analyzed in 1950, the Cultured Mushroom Salt that contained cornstarch.

In 1955 Mr. William W. Wallace analyzed Cultured Mushroom Salt that contained cultivated mushrooms

and salt, of which the gravitation is lighter than the product that contained cornstarch in it. That is the reason why the variation was found in the head space fill. The shakers that contained Cultured Mushroom Salt without cornstarch, the head space looked fuller. The shakers that contained Cultured Mushroom Salt with cornstarch in it looked less full because the gravitation of the product is heavier and it settles and packs down. And that is what Mr. William W. Wallace analyzed after Februry 1955.

Mr. A. T. Lelles testified as to the Lot. No. 102 and Lot No. 103 that the Food & Drug Department had come into stockroom and the office of the Company a number of times, took other samples from Lot No. 102 and Lot No. 103 (Tr. 59) and never complained about the quality. All the Cultured Mushroom Salt in the premises were from Lot No. 102 and Lot No. 103.

The analysis cited by the Court in the decision is not inconsistent with the position of the appellant.

ANALYSIS OF DOTTERWEICH CASE

The Court felt that the present case was decided by the Supreme Court adversely to the position of the Appellant herein, and cited the case of *United States vs. Dotterweich*, 320 U.S. 277.

The Dotterweich case history shows that the Second

Circuit of Appeals in 131 Fed. (2d) 500, revised the conviction. The Supreme Court, on the appeal of the government, reversed the Circuit Court in a five to four decision.

The merits of our position is set out in the dissenting opinion of Justice Murphy. Justice Rutledge, Justice Reed and Justice Roberts concurred in the dissent.

It is our feeling that the case now before the Court can be distinguished from the Dotterweich case, and such distinguishing features are of such a nature that even the majority opinion would not reach the same results.

In the Dotterweich case the defendant was charged as President and General Manager of Buffalo Pharmacal Co., Inc. The jury disagreed as to the corporation and found the defendant guilty on two counts. The Circuit Court of Appeals found that the evidence was sufficient to support the verdict of adulteration and misbranding.

In the case befort the Court there was no evidence that the corporation named in the indictment was guilty. While it is true that the trial judge let it go to the jury he recognized his mistake after the verdict and corrected it by dismissing the corporation.

The corporation that committed the crime in this

case was not named in the indictment. We went to trial on the charge set forth in the indictment and that charge was against "Cultured Mushroom Industries, Inc., and A. T. Lelles, an individual, at the time President of said corporation * * *"

The Washington Mushroom Industries, Inc., according to all the evidence, violated the law, if there was a violation. It can only act, as every corporation acts, through its officers. Now if Lelles' conviction is allowed to stand, then he is convicted of acting in a capacity with which he is not charged. It may be true, as this Court said, that he was charged as an individual, but if that is true then there was no evidence to sustain a conviction. He did not fill the order, nor ship it. The theory of his individual liability arises from his association with the corporation; in this case, Washington Mushroom Industries, Inc., and, if so, then he is entitled under the Constitution of the United States, to know the charge so that he can properly defend himself.

The merit of the above line of reasoning is more clearly stated in Justice Murphy's dissenting opinion on pages 290 and 291 of the Dotterweich decision (*supra*).

It has been stated that for the good of the public, the

officers of a corporation are responsible as individuals for the illegal acts of said corporation. This is a recent extension of criminal liability, especially when it is extended to situations where the individual does not participate personally in the act. It is true that our objections to such legislation should be directed toward Congress but that does not mean we are to be deprived, prior to trial, of the knowledge of which corporation committed the offense.

The United States Attorney, until the dismissal, sought without avail to sustain the indictment to the effect that Lelles was the President of the Cultured Mushroom Industries, and, therefore, individually liable.

The trial judge, by dismissing the corporation, decided they did not commit the crime. In the Dotterweich case the jury disagreed but the man charged as its President and General Manager was found guilty.

It is respectfully submitted that there is no evidence; no effort was made by the Government to prove Lelles' individual liability, except in his corporate capacity. The case was allowed to go to the jury on his connection with a corporation not mentioned in the

indictment, and deprived the appellant of his constitutional rights to be informed before trial of the charge.

It is sincerely urged that this petition be granted.

Respectfully submitted,

JEFFREY HEIMAN

Attorney for Petitioner.

No. 15,139.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ONE, INCORPORATED, a corporation,

Appellant,

vs.

OTTO K. OLESEN, individually and as POSTMASTER of the
City of Los Angeles,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S OPENING BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant United States Attorney,
Chief, Civil Division,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

FILED

AUG -6 1956

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Jurisdictional statement	1
Statutes involved	1
Statement of the case.....	2
Summary of argument.....	3
Argument	4

I.

The October 1954 issue of "One" is nonmailable matter under the provisions of 18 U. S. C. A. 1461.....	4
A. A statement of the issue involved.....	4
B. The particular portions of the magazine which are considered obscene	4
C. Sappho Remembered	5
D. Lord Samuel and Lord Montagu.....	6
E. The advertisement for "The Circle".....	7
F. The book as a whole doctrine.....	8
G. The intent and motive of the publisher.....	10
H. The responsibility of the advertiser.....	13

II.

The statute, 18 U. S. C. A. 1461, is constitutional.....	14
Conclusion	15

TABLE OF AUTHORITIES CITED

CASES	PAGE
Besig v. United States, 208 F. 2d 142 (9 Cir. 1953).....	7, 9
Commonwealth v. New, 16 A. 2d 437 (Penn. 1940).....	9
Consumers Union v. Walker, 145 F. 2d 33 (D.C. Cir. 1944)....	10
Donaldson v. Read Magazine, 333 U. S. 178 (1948).....	14
Hannegan v. Esquire, Inc., 327 U. S. 146 (1946).....	7
Parmelee v. United States, 113 F. 2d 729 (D.C. Cir. 1940).....	5
People v. Wepplo, 178 P. 2d 853 (Calif. 1947).....	9
Public Clearing House v. Coyne, 194 U. S. 497 (1904).....	14
Schindler v. United States, 208 F. 2d 289 (9 Cir. 1953).....	11
Sunshine Book Co. v. Summerfield, 24 Law Week 2560 (D.C. Cir., May 31, 1956).....	11
Turner v. United States, 35 F. 2d 25 (8 Cir. 1929).....	9
Tyomies Publishing Co. v. United States, 211 Fed. 385 (6 Cir. 1914)	6, 9, 15
United States v. Dennett, 39 F. 2d 564 (2 Cir. 1930).....	11
United States v. Levine, 83 F. 2d 156 (2 Cir. 1936).....	5
United States v. Limehouse, 285 U. S. 424 (1932).....	6, 7
United States v. Rebhuhn, 109 F. 2d 512 (2 Cir. 1940).....	14
Walker v. Popenoe, 149 F. 2d 511 (D.C. Cir. 1945).....	6
Youngs Rubber Co. v. Lee, 45 F. 2d 103 (2 Cir. 1930).....	10

CODES

18 United States Code Annotated 1461.....	1, 2, 4, 6, 7, 8, 13, 14
28 United States Code Annotated 1291.....	1
28 United States Code Annotated 1339.....	1

No. 15,139.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ONE, INCORPORATED, a corporation,

Appellant,

vs.

OTTO K. OLESEN, individually and as POSTMASTER of the
City of Los Angeles,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S OPENING BRIEF.

Jurisdictional Statement.

This suit was filed in the District Court to enjoin the Postmaster from refusing to accept for mailing the October 1954 issue of "One", under authority of 18 U. S. C. A. 1461. Inasmuch as this Statute involves the postal service, the District Court had jurisdiction of the action under 28 U. S. C. A. 1339.

This Court has jurisdiction of the appeal from the District Court's Judgment under 28 U. S. C. A. 1291.

Statutes Involved.

The following portions of 18 U. S. C. A. 1461 are applicable to the case:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and— * * *

“Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained * * *

“Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any Post Office or by any letter carrier. * * *”

Statement of the Case.

This is a suit brought in the District Court to enjoin the Postmaster from refusing to accept for mailing the October 1954 issue of “One”, under authority of 18 U. S. C. A. 1461.

In the District Court the parties agreed that the only issue involved was whether the magazine is nonmailable matter, and that the case could therefore be decided on Motions for Summary Judgment.

In deciding the case in favor of the Postmaster, the District Court considered the October 1954 issue of “One” which was attached as an exhibit to the Complaint, as well as the affidavits filed by the parties in support of their Motions for Summary Judgment.

The Appellant filed two affidavits. One was the affidavit of Eric Julber, to show that the Appellant’s attorney had examined samples of the European publications which are advertised in “One”, that he did not consider them to be in violation of the Postal Laws, and that he so advised the Appellant. The other was the affidavit of William Lambert, to show that the Business Manager of the Appellant had examined samples of the European publications which are advertised in “One”, that he had never

known of an instance where in his opinion one of these publications was obscene, except the one attached to the affidavit filed by the Appellee, and that if he had known of such a case he would have advised the publisher that he could no longer advertise in "One".

The Appellee filed the affidavit of Nelle C. Wood, to show the nature of one of the European publications which is advertised in "One".

Summary of Argument.

The October 1954 issue of "One" is nonmailable matter because the magazine "as a whole" is obscene. The story "Sappho Remembered" is lustfully stimulating to the homosexual reader, the poem "Lord Samuel and Lord Montagu" contains filthy language, and the advertisement for "The Circle" gives information for the obtaining of obscene matter.

The intent and motive of the publisher is immaterial to the issue of this case because there is no ambiguity as to the obscene nature of the magazine. Even if this is material, it does not appear that the Trial Court failed to consider it.

While it may be that an advertiser should not be held criminally responsible when he has no knowledge of the nature of the material advertised, he is responsible to the extent that a nonmailable advertisement cannot be carried in the mail.

The law is well established that the power of Congress to bar obscene material from the mail does not violate the Constitution.

ARGUMENT.

I.

The October 1954 Issue of "One" Is Nonmailable Matter Under the Provisions of 18 U. S. C. A. 1461.

A. A Statement of the Issue involved.

Some of the arguments made by the Appellant are that the Trial Court erred in finding that the October 1954 issue of "One" is nonmailable matter under 18 U. S. C. A. 1461; that the action of the Postmaster in refusing to accept the magazine for mailing was arbitrary, capricious and an abuse of discretion, unsupported by evidence; and that the Trial Court erred in concluding that the action of the Postmaster was correct.

It is submitted that these arguments raise one question, namely whether or not the October 1954 issue of "One" is nonmailable matter under the provisions of 18 U. S. C. A. 1461.

B. The Particular Portions of the Magazine Which Are Considered Obscene.

We contend that the magazine does constitute nonmailable matter because the magazine as a whole is obscene, and particularly because of the following three portions of the magazine:

1. The story entitled "Sappho Remembered", appearing on pages 12 through 15. Briefly stated, this story is obscene because lustfully stimulating to average homosexual reader.

2. The poem "Lord Samuel and Lord Montagu", appearing on pages 18 and 19. This poem is obscene because of the filthy words contained in it.

3. The advertisement for the Swiss publication "The Circle", appearing at the top of page 29. We do not contend that this advertisement is obscene in and of itself, but this advertisement makes "One" nonmailable matter because it gives information for the obtaining of obscene material.

C. Sappho Remembered.

As stated above, this story is considered obscene because lustfully stimulating to the average homosexual reader. The story deals with a lesbian love triangle, and contains descriptive passages and references calculated to excite lewd thoughts and sensual desires in the sexual deviate reading it. It is difficult to see what other purpose this story could possibly serve.

Admittedly going to sexual deviates, and probably only to sexual deviates, the contents of this story may be tested for obscenity according to its likely effect upon such persons.

In *United States v. Levine*, 83 F. 2d 156 (2 Cir., 1936), the Court said:

"It may appear that the prospective buyer in the eighth count was a youth and that the accused had reason to suppose that he was. The evil against which the statute is directed, would then be the possible injury to such a youthful reader."

In *Parmelee v. United States*, 113 F. 2d 729 (D. C. Cir., 1940), the Court noted:

"* * * book must be considered * * * in its effect, not upon any particular class but upon all those *whom it is likely to reach*." (Emphasis added.)

In *Walker v. Popenoe*, 149 F. 2d 511 (D. C. Cir., 1945), it was held that:

“* * * The effect of a publication on the ordinary reader is what counts * * * if a publication as a whole is not stimulating to the senses of the ordinary reader, it is not within the statute.”

With respect to “One”, it is respectfully submitted that the “ordinary reader” is the homosexual reader.

D. Lord Samuel and Lord Montagu.

Section 1461, in addition to its proscription of obscene, lewd and lascivious matters, also forbids the mailing of that which is filthy, held by the Supreme Court to constitute a separate class of matter from the obscene.

United States v. Limehouse, 285 U. S. 424 (1932).

In the *Limehouse* case the term filthy was held to apply to letters which were characterized by the Court as “coarse, vulgar, disgusting, indecent”.

See also *Tyomies Publishing Co. v. United States*, 211 Fed. 385 (6 Cir., 1914), which approved the following definition given by the Trial Judge:

“By the term ‘filthy’ is meant what it commonly or ordinarily signifies; that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving and debasing.”

The aforesaid poem “Lord Samuel and Lord Montagu” is concerned with the alleged homosexual activities of Lord Montagu, which are dealt with in the poem in a coarse, vulgar, disgusting manner.

As discussed above, in determining obscenity, the Courts will consider the effect of a publication upon those to

whom it is sent, inasmuch as in this phase of the law the question to be decided is whether it will have the tendency to arouse its readers sexually. However, the same would not be true in considering whether or not an article is filthy "within the popular meaning of the term", as the Supreme Court said in the *Limchouse* case. An article may be inherently vile, foul, disgusting, even though not regarded as such by a particular individual or group of individuals to whom it is sent because of their own social or moral standards far at variance and below those of the general community.

As this Court also observed in *Besig v. United States*, 208 F. 2d 142 (9 Cir., 1953):

"It is of course true that the ears of some may be so accustomed to words which are ordinarily regarded as obscene that they take no offense at them, but the law is not tempered to the hardened minority of society."

And the Supreme Court of the United States in its decision in *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946), noted that "the validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes no matter how perverted."

E. The Advertisement for "The Circle."

In the Trial Court the affidavit of Nelle C. Wood was filed with the Appellee's Motion for Summary Judgment, to prove that the Swiss publication "The Circle", which is advertised in "One" is in fact obscene. If it is, this advertisement is also in violation of 18 U. S. C. A. 1461, because it gives information through the mails for obtaining obscene matter.

In submitting the July 1954 issue of "The Circle" we did not ask the Trial Court, and we do not ask the Appellate Court to consider the portions printed in French and German because we believe that the English portions, and particularly some of the pictures are unquestionably obscene.

The stories "All This And Heaven Too" appearing on pages 32 and 33, and "Not 'Til The End" appearing on pages 34 through 36, would seem to be in the same category as the story "Sappho Remembered", except that they depict the activities of the male homosexual rather than lesbians. These stories are also obscene because lustfully stimulating to the average homosexual reader.

The picture paper-clipped to page 1 of the magazine is obscene by any standard since it shows the male genitalia. This picture is probably both stimulating to the average male homosexual and filthy and disgusting to the normally inclined person. The sketches on pages 1 and 9 would seem to fall in the same category. We would also raise some question about the photograph on page 19, showing two young men in the nude, one with his hand over his private parts, and the drawing on page 20, showing one male washing the back of the other.

F. The Book as a Whole Doctrine.

Although we have emphasized specific portions of the magazine, we contend that the October 1954 issue of "One" comes within the prohibition of 18 U. S. C. A. 1461, also when tested under the well settled principle that the "book as a whole" must be obscene.

It should first be noted that while the Courts hold that a book must be considered "as a whole" in determining whether it is obscene, magazines have been held to be in

violation of the law solely because of individual articles or pictures contained therein.

Turner v. United States, 35 F. 2d 25 (8 Cir. 1929);

Tyomies Publishing Co. v. United States, 211 Fed. 385 (6 Cir. 1914);

Commonwealth v. New, 16 A. 2d 437 (Penn. 1940).

In discussing the "book as a whole" doctrine, the Superior Court of Los Angeles County in *People v. Wepplo*, 178 P. 2d 853 (Calif. 1947), held, "The problem is to be solved, not by counting pages, but rather by considering the impressions likely to be created. For example, a book might be found to come within the statute although only a comparatively few pages contained matter objectionable according to the principles herein explained, if that matter was such as to offer a strong salacious appeal and to cause the book to be bought and read on account of it."

And in *Besiz v. United States*, 208 F. 2d 142 (9 Cir. 1953), this Court observed:

"We agree that the book as a book must be obscene to justify its libel and destruction, but neither the number of the 'objectionable' passages nor the proportion they bear to the whole book are controlling. If an incident, integrated with the name or story of a book, is word painted in such lurid and smutty or pornographic language that dirt appears as a primary purpose rather than the relation of a fact or adequate description of the incident, the book itself is obscene."

G. The Intent and Motive of the Publisher.

The Appellant has also argued in its Brief, and in its affidavits, that the October 1954 issue of "One" should not be considered nonmailable matter because its publishers acted upon good intentions and motives and upon the advice of counsel.

We believe that as a matter of law these things are immaterial to the issue of this case. If the magazine is obscene it is nonmailable matter, and the Postmaster is simply not permitted to convey it in the mail.

It should be noted that the cases cited by Appellant do not stand for the proposition that guilty knowledge is a necessary element in a case of this kind. All of the cases except *Consumers Union v. Walker*, 145 F. 2d 33 (D.C. Cir. 1944) and *Youngs Rubber Co. v. Lee*, 45 F. 2d 103 (2 Cir. 1930), are criminal cases. The *Youngs Rubber Co.* case, was a trade-mark case in which the Court held that both the private litigants were engaged in an illegal business (contraceptives). The *Consumers Union* case was a civil Post Office case involving an article on contraceptives. The Court enjoined the administrative action because the article was unquestionably scientific in its presentation and purpose, comparable to a similar article appearing in the American Medical Journal. Furthermore, the Court in that case specifically distinguished cases such as the one under consideration with the following language at page 34:

"Cases which uphold the power of Congress to bar from the mails obscene, lewd, lascivious or fraudulent matter, or publications concerning lotteries, or which tend to encourage arson, murder, or assassination are clearly distinguishable."

It should also be noted that even in a criminal proceeding the good motive of the defendant is immaterial if the thing mailed is in fact obscene.

United States v. Dennett, 39 F. 2d 564 (2 Cir. 1930).

It is also well settled that it is no defense to show that the defendant did not personally consider the matter obscene on the advice of counsel.

Schindler v. United States, 208 F. 2d 289 (9 Cir. 1953).

One case cited by Appellant which does hold that the intent of the publisher is to be considered is *Sunshine v. Summerfield* (24 Law Week 2560, D.C. Cir. May 31, 1956). We submit that this case is totally dissimilar to the case at bar and therefore distinguishable.

In the *Sunshine* case, the Court was considering a nudist magazine. The Trial Court and the Post Office Department had found that the subject of nudism and the text of the magazine dealing with it were perfectly legitimate. The decision barring the magazine from the mail was based solely on the photographs of nudists. In reversing, the Court of Appeals said that the Trial Court and the Post Office Department should have considered the intent of the publisher.

The significant thing about the *Sunshine* case is that a picture of a nudist in a nudist magazine, with nothing more, may or may not be obscene. It is possible that the over-all purpose of the magazine is serious and that the pictures are necessary to illustrate the text of the magazine. On the other hand, the basic nature of the magazine may be such that the purpose is not legitimate but

rather is designed to pander to the lewd and lascivious. The intent of the publisher is therefore necessary to decide that question.

In the case of "One" the subject of the magazine is unquestionably homosexuality. We are not here contending that this cannot be a legitimate subject such as nudism. The point we make is that the three portions of the magazine we have emphasized are in no way necessary or relevant to a legitimate discussion of the subject of homosexuality.

We agree with Appellant that this is a knotty problem. We cannot agree however, that this magazine is in any way an answer to the question.

As pointed out above, the story "Sappho Remembered" is lustfully stimulating to the homosexual. This story accomplishes nothing toward solving the problem of homosexuality. If anything, it compounds an already deplorable situation by exciting lewd thoughts and desires in homosexuals.

Going back again to the poem "Lord Samuel and Lord Montagu," we fail to see why the use of filthy language is necessary to a serious discussion of the subject of homosexuality. Obviously it is permissible to use such language in a dictionary explaining the meaning of the words themselves. The fact remains, however, that the words are filthy and that they are in no way related to the problem of homosexuality.

With regard to the pictures in "The Circle", which is advertised in "One," these might have some legitimate pur-

pose in a nudist magazine, in which case it might be relevant to inquire into the intent of the publisher. In a homosexual magazine, however, they are not material to a serious discussion of the subject, and serve only the purpose of pandering to the lewd and lascivious appetite of a homosexual.

Finally, let us assume that the intent of the publisher is relevant to this case. Even if that is so it does not appear that the Trial Court failed to consider this element. In this case the Appellant asked the Trial Court to decide the case on Summary Judgment. In doing so affidavits were filed. After considering these affidavits, which were not controverted by the Appellee, the Trial Court made its Findings of Fact, Conclusions of Law and Judgment in favor of Appellee.

H. The Responsibility of the Advertiser.

The Appellant also contends that it should not be held responsible for advertising of nonmailable matter when it has no knowledge of the nature of the material advertised.

If this were a criminal prosecution under 18 U. S. C. A. 1461, the situation might be different, in that the statute provides that the offense must be committed with guilty knowledge. The statute is in two parts, however. The portion under which the Postmaster refused to accept the magazine provides unconditionally that information for the obtaining of nonmailable matter shall not be conveyed in the mail. The Postmaster does not impose any criminal penalty; he merely follows the mandate of the statute in refusing to transmit nonmailable matter.

II.

The Statute 18 U. S. C. A. 1461 Is Constitutional.

The constitutional objections raised in the Appellant's Brief are that the action of the Postmaster in refusing to accept the magazine for mailing deprives Appellant of equal protection of the laws and constitutes a deprivation of Appellant's property and liberty without due process of law. If the Postmaster has correctly decided to refuse to accept the magazine under authority of 18 U. S. C. A. 1461, and has thus complied with the statute, the question is whether the statute is constitutional.

It is submitted that this question has long since been settled on the theory that the use of the mails is not an absolute right but a conditional privilege, and that Congress may except obscene matter from the mail as a valid condition to the privilege.

Donaldson v. Read Magazine, 333 U. S. 178 (1948);

Public Clearing House v. Coyne, 194 U. S. 497 (1904);

United States v. Rebhuhn, 109 F. 2d 512 (2 Cir., 1940);

Tyomies Publishing Co. v. United States, 211 Fed. 385 (6 Cir., 1914).

Conclusion.

The October 1954 issue of "One" is nonmailable matter, the Postmaster was therefore correct in refusing to accept it for mailing, and the Judgment of the District Court should therefore be affirmed.

Dated: Los Angeles, California, 1956.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
*Assistant United States Attorney,
Chief, Civil Division,
Attorneys for Appellee.*

No. 15141.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

IRL DAVIS BRETT,

458 South Spring Street,
Los Angeles 13, California,

Attorney for Appellant.

FILED

DEC 24 1956

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Preliminary statement	1
Summary of reply argument.....	3
Argument.....	4
1. The testimony of the witness, Bruner, did not constitute substantial evidence to support the trial court's finding as to negligence	4
2. The Jesionowski case supports appellant's contention that the court was in error in concluding that the doctrine of res ipsa loquitur did not apply to this case.....	9
3. The interpretation of the discretionary function exemption (28 U. S. C., 2680(a)) which is discussed on pages 18 to 24 of appellant's opening brief is not erroneous and contrary to Dalehite.....	12

TABLE OF AUTHORITIES CITED

CASES	PAGE
Dahlstrom v. United States, 228 F. 2d 819.....	12
Eatwell v. Beck, 41 Cal. 2d 128, 257 P. 2d 643.....	13
Fair v. United States, 234 F. 2d 288.....	12
Jesionowski v. Boston & Maine Railroad, 329 U. S. 452.....	2, 3, 11
Paraffine Companies v. McEverlast, Inc., 84 F. 2d 335.....	7
Pierce v. United States, 142 Fed. Supp. 721.....	12, 13, 16
Rown v. Brake Testing Corporation, 38 F. 2d 220.....	7
Somerset Seafood Co. v. United States, 193 F. 2d 631.....	17
State of Washington v. United States, 214 F. 2d 33.....	6
Turnipseed v. Moseley, 248 Ala. 340, 27 So. 2d 483, 170 A. L. R. 882	7
United States v. Booth-Kelly Lumber Co., 203 Fed. 423.....	7
United States v. Pierce, 235 F. 2d 466.....	12

STATUTE

United States Code, Title 28, Sec. 2680(a).....	2
---	---

No. 15141.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

Preliminary Statement.

Counsel for appellant has found three typographical errors in the printed Appellant's Opening Brief which the Court is requested to have corrected, to-wit:

On page 15 the text as printed reads:

"We, therefore, submit that the evidence points to no other rational conclusion that the air shock waves produced by the atomic explosions were a proximate cause of the resulting damage to Appellant's property."

There should have been inserted therein between the word "conclusion" and the word "that" the word "then" so that as corrected the text should read:

"We, therefore, submit that the evidence points to no other rational conclusion than that the air shock waves produced by the atomic explosions were a proximate cause of the resulting damage to Appellant's property."

On page 17 the first line as printed reads:

“At we have already shown, appellee has made no rational explanation which would absolve it from negligence.”

The word “At” should have been “as” so that as amended the text should read:

“As we have already shown, appellee has made no rational explanation which would absolve it from negligence.”

On page 12, at the beginning of the second paragraph the word “Appellant” should be “Appellee.”

Appellee has served a 74-page brief, much of which relates to and discusses the activities at *planning level* which were not put in issue at the trial [R. 174-175] nor in our Opening Brief (App. Br. 21). The principal arguments in the Government’s Brief which seem to merit comment and reply in addition to the material contained in our Opening Brief are the following:

1. Did the testimony of the witness, Bruner, produce substantial evidence to support the trial court’s finding as to negligence (Gov. Br. 2, 17, 59-65)?
2. Does the *Jesionowski* case support the trial court’s determination that the doctrine of *res ipsa loquitur* did not apply?
3. Is the interpretation of the discretionary function exemption (28 U. S. C. 2680 (a)) by the most recent circuit court’s decisions which are cited in our Opening Brief (App. Br. 18-21) erroneous and contrary to *Dalehite* (Gov. Br. 53-57).

Summary of Reply Argument.

We will demonstrate in the next few pages of this Reply Brief:

1. That the Bruner testimony together with his drawing [Ex. F] did not constitute *substantial evidence* which would support the trial court's Finding XV; that the trial court did not in fact find either expressly or indirectly that the testimony of Bruner was true and accepted by it and that the contrary testimony of the appellant's witnesses was untrue; that the evidence of Bruner was entirely opinion evidence which, as a matter of law, could not be better than the facts upon which it was based and that since the witness admitted that he never saw the property until approximately five months after the buildings were shaken by the atomic explosions and the evidence of three of appellant's witnesses as to the physical facts existing at the time of the explosions were *undisputed*, Bruner's *opinion contrary to such facts is not substantial evidence* and must be disregarded. Lastly, that, since Bruner's testimony was by deposition, the presumption in support of the court's findings based upon the *conflicting substantial evidence rule* does not apply and this court may, itself, determine that such finding is clearly erroneous.

2. That the rationale of the *Jesionowski* case, when applied to the record here, demonstrates and supports our contention that the trial court committed reversible error in refusing to apply of the doctrine of *res ipsa loquitur*.

3. That *Dalehite* is clearly distinguishable from the facts in this case; that the interpretation of the discretionary function exemption set forth on pages 18-21 of our Opening Brief has been joined by the Sixth Circuit in a later decision and that, as applied to the facts here, such interpretations are correct and should be applied in this cause.

ARGUMENT.

1. The Testimony of the Witness, Bruner, Did Not Constitute Substantial Evidence to Support the Trial Court's Finding as to Negligence.

Preliminarily, the attorney who prepared the Opening Brief and is preparing this brief is concerned with the fact that no reference was made to the Bruner testimony in the Opening Brief. In fact, we had completely overlooked and forgotten such testimony while engaged in the preparation of such brief. Upon re-examining the trial court's memorandum of decision [R. 17-23] its Findings of Fact and Conclusions of Law [R. 23-30] we note that no reference was made to and no finding was made upon the purported conflict of the testimony of Bruner [R. 308-337] and the testimony of appellant's witnesses, Arthur J. Seale [R. 56, 58, 60], Chrystal B. Seale [R. 66, 68, 69] and Norwood [R. 130-136] which is referred to on page 64 of the Government's brief. We also have re-examined the voluminous briefs which were filed with the trial court and find that in no part thereof was there any reference made to or any reliance by Government Counsel upon the Bruner testimony. We mention this solely in explanation of the omission to refer to it in the Opening Brief.

It was conceded at the trial that Mr. Bruner was a qualified expert with the reservation that appellant objected to his qualification to testify as to the specific character of the construction or as to the condition of the improvements at the time when the atomic explosions occurred [R. 314]. The conclusive factor with regard to the Bruner testimony is that it did not rise to the status of *substantial evidence* for the reason that it was ex-

clusively opinion evidence which was directly contrary to undisputed physical factual evidence. Succinctly summarized the witness Bruner testified:

That settlement takes place commencing with the construction and continuously thereafter and that such settlement and the expansion and contraction caused by extreme temperature changes produced the cracks which he observed in the buildings which are involved in this litigation [R. 319-320]; that the cracks which he saw in the plaster walls and ceilings of these buildings *during April, 1952*, were both new and *old* [R. 324] and that it was his opinion that these cracks were the results of temperature changes [R. 327]; that the plaster was cracked and patched before these buildings were finished [R. 328] although he admitted that his only information was that these buildings were completed about 10 years before the date when he first saw the property [R. 323]. He referred to a drawing, which he had prepared, which was marked as Defendant's Exhibit A for identification and was so referred to in his deposition [R. 318, 320, 325 and 338]; which was later received in evidence as Defendant's Exhibit F [R. 338] and is before this court as an original exhibit. While he stated that such drawing "is typical of the construction in the Bartholomae ranch" [R. 320] in other portions of his testimony he admitted that he could not detect whether or not the plaster was fibered [R. 320, 323]; that he did not tear out any sections to learn about the construction [R. 322]; that he did not see the plans and specifications [R. 322] and that his drawing *might or might not* represent the type and character of the construction of the Bartholomae buildings [R. 325]. Furthermore, since the writing is before this court, it can de-

termine from an inspection thereof whether or not such drawing discloses any scale, or the depth of the footings in the ground, or the width of the foundations, or the type of concrete mix, or the size of the floor joists, or the type of roof, or the type of flooring or its size, or the size of the joists; whether there was roof bracing, or the type of insulation, ventilation or the numerous other factors which this court would judicially know to be a necessary and elementary part of an illustration of "typical construction": and which deficiencies are pointed out by the witness Norwood [R. 339].

The basic deficiency in the Bruner testimony which prevents it from reaching the status of "substantial evidence" is the express admission of the witness that he had never been to the property before April, 1952:

"Q. Had you ever been to this ranch before your trip, in April, 1952? A. No, sir [R. 324]."

Taken together with the *undisputed physical evidence testimony* of the Seales and the witness Norwood [Arthur J. Seale—R. 56, 58, 60; Chrystal B. Seale—R. 66, 68-69; Norwood—R. 130-132]; the photographs taken by Mr. Millard and the charts showing the character, length and directions of the cracks [Exs. 5, 10-25 incl.]. In the light of these physical facts (which directly controvert the opinion of the witness Bruner) that there *were no cracks* up to the time of the atomic explosions with which we are here concerned, the opinion that cracks had taken place prior thereto must fall and does not constitute *substantial evidence*. This court has so held in *State of Washington v. United States*, 214 F. 2d 33, at pages 41 and 43.

In addition to the foregoing, this court will recognize that the testimony of appellant's witnesses, Mr. and Mrs. Seale, and the testimony of the Government's witness, Bruner, was entirely by deposition. Thus, this court, itself, may and should weigh the testimony without the aid of any presumption favoring the decision of the trial court upon the issues presented by such testimony:

"The findings in the court below are made upon evidence which had been taken before an examiner and not in open court and they are not attended with presumptions in favor of findings which are made on conflicting testimony where the trial judge has the opportunity to observe the demeanor of the witnesses." *United States v. Booth-Kelly Lumber Co.* (C. A. 9), 203 Fed. 423, 429.

"All the testimony upon the issue having been taken out of presence of the trial court, by deposition, the presumption in support of findings based upon conflicting testimony in court does not prevail." *Rowen v. Brake Testing Corporation* (C. A. 9), 38 F. 2d 220, 223-224.

To same effect, *Cf. Paraffine Companies v. McEverlast, Inc.* (C. A. 9) 84 F. 2d 335, 339.

"The evidence was by deposition taken before a commissioner and we must sit in judgment on the facts, as if at *nisi prius* and arrive at a just conclusion without the aid of any presumption favoring the decision of the trial court on the issues presented." *Turnipseed v. Moseley*, 248 Ala. 340, 27 So. 2d 483, 170 A. L. R. 882.

Lastly, the trial court did not expressly or impliedly find that the Bruner testimony and opinions are true. The only findings which could be construed to have reference to

such testimony are Findings IV and XV. Finding IV reads:

“That *during or about* the period above referred to, plaster in the buildings on the land of plaintiff shows evidence of cracking.” (Emphasis supplied.)

Finding III discloses that the “period above referred to” was the period between October 2, 1951 and November 5, 1951 when the atomic explosions here under consideration occurred. Such finding is directly in line with the testimony of appellants witnesses and directly *contrary* to the testimony of Bruner which was to the effect that the cracks had occurred before the buildings were completed and continuously thereafter and that many of the cracks which he saw when he made his first and only visit to the premises in April, 1952, were *old* and were the result of temperature changes. It is also directly contrary to the temperature charts which are annexed to and a part of the Bruner deposition.

In Finding XV the court states, in part:

“Upon the evidence before it, this court can not find that any officer or employee of the United States was negligent in the performance of his duties relating to atomic experimentation or that the atomic detonations were the proximate cause of the damage to plaintiff’s property. The court finds that blast waves released from atomic detonation during the period in question may have reached the property of plaintiff on one or two occasions during the period involved
* * *” [R. 29].

It is clear that the only portion of such part of Finding XV which could conceivably have reference to the issues presented by the Bruner testimony is:

“* * * or that the atomic detonations were the proximate cause of the damage to plaintiff’s property” [R. 29].

But, in view of the fact that the trial court had limited the period of time when the cracking in the plaster appeared to the period when the atomic blasts occurred [Finding IV in R. 25], it clearly appears that the trial court was *not* finding in line with or in affirmance of Bruner’s concept that the cracking occurred at a much earlier time and from *temperature changes or settlement*.

2. The Jesionowski Case Supports Appellant’s Contention That the Court Was in Error in Concluding That the Doctrine of Res Ipsa Loquitur Did Not Apply to This Case.

The trial court made no express finding or conclusion upon this issue but in footnote 1 to its memorandum of decision [R. 18] it held that the doctrine could not be applied because the evidence did not show that the “accident” is of such a nature that it ordinarily did not occur in the absence of negligence by the appellee. We have shown that this was reversible error (App. Br. 16-17) but the Government has replied that the *Jesionowski* case supports the trial court’s conclusion (Gov. Br. 67). To the contrary, we believe that this decision squarely supports our contentions. In the *Jesionowski* case the trial court has instructed the jury upon the doctrine because

the evidence had eliminated any possibility that such control as was had by the plaintiff could have caused the damage of which the plaintiff complained. The First Circuit *reversed*, stating in part:

“The thing that caused the injury could have been *Jesionowski’s* fault, or it could have been the railroad’s fault. It was the jury’s duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur* * * *. Thus, an essential element of the principle of *res ipsa loquitur* is that the defendant have exclusive control of the thing causing the injury. Such essential element is not clear in this case.” *Boston & Maine Railroad v. Jesionowski* (C. A. 1), 154 F. 2d 703, 705.

Stopping here, we note that in our case in footnote 1 [R. 18] the trial judge determined that, since one of the elements of the rule is that the “accident” would not ordinarily occur in the absence of negligence by the defendant and since plaster cracking could occur from temperature changes and earthquakes, *even though the uncontradicted record is that both possibilities were eliminated* through the undisputed testimony of witnesses for appellant¹ the doctrine could not be applied. Thus, the trial court’s reasoning is directly in line with the reasons and conclusions above expressed by the First Circuit.

¹As to plaster cracking, *Cf.* discussion under point one, *supra*; as to no earthquake in that area during the time of these blasts [*Cf.* Millard, R. 115-116].

The Federal Supreme Court *reversed* this concept of the First Circuit stating:

“We cannot agree. *Res ipsa loquitur*, thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, *even though it was proved that his operations of the things under his control did not cause the accident.*” (Emphasis supplied.)

It expressly found that the doctrine was properly applied by the trial court, stating:

“Thus, the question here really is not whether the application of the rule fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding that (the damage) was the result of defendant’s negligence.” (Insertion supplied.) *Jesionowski v. Boston & Maine Railroad*, 329 U. S. 452, 457.

We believe that the foregoing demonstrates that where, as here, other factors which might have affected the result have been eliminated by uncontradicted evidence, the Federal rule requires that the doctrine of *res ipsa loquitur* be applied, even though it would not have been applicable had such other possible causes not have been eliminated.

3. The Interpretation of the Discretionary Function Exemption (28 U. S. C., 2680 (a)) Which Is Discussed on Pages 18 to 24 of Appellant's Opening Brief Is Not Erroneous and Contrary to *Dalehite*.

We have shown in our Opening Brief (pp. 18-24) that the Fifth Circuit and the Eighth Circuit have concluded that:

"If the Government, at the operational level, acts either contrary to the plan or in a manner not required by the plan, then the activity would not be discretionary and redress can be had for the resulting injury."

We quoted from and cited the opinion of the Eighth Circuit—*Dahlstrom v. United States*, 228 F. 2d 819, 821 and from the Fifth Circuit—*Fair v. United States*, 234 F. 2d 288, 294. Since our Opening Brief was prepared this concept has been accepted and adopted by the Sixth Circuit—*United States v. Pierce*, 235 F. 2d 466, which expressly adopted and approved the opinion of the District Court in *Pierce v. United States*, 142 Fed. Supp. 721, 730-733. We believe that these excellent and well reasoned opinions are sound and will be followed by this court.

But appellee constantly reiterates that such decisions are contrary to *Dalehite* (*Dalehite v. United States*, 346 U.S. 15) and page III of the index to the Government's Brief discloses that *Dalehite* has been referred to nineteen times therein. There are certain contentions made with respect to the *Dalehite* opinion which, we believe, are erroneous.

Appellee states that *Dalehite* did *not* limit the exception here under consideration to high level policy judgment

(Gov. Br. 55). We ask this court to note the following excerpt from *Dalehite* (p. 42) which is quoted by the District Judge in *Pierce v. United States*, at page 731:

“The decisions held culpable were all responsibly made at a planning rather than operational level.
* * *”

It thus appears that in *Dalehite*, irrespective of the breadth of its general language, the Supreme Court was considering and ruling upon alleged negligence arising out of decisions “made at *planning* rather than *operational* level.” (Emphasis supplied.) It is elementary that:

“* * * the language used in any opinion is to be understood in the light of the facts and the issue then before the court.” *Eatwell v. Beck*, 41 Cal. 2d 128, 136, 257 P. 2d 643.

Appellee erroneously asserts that there is a close parallel between the *facts* in *Dalehite* and in this case (Gov. Br. footnote 31, p. 37). We submit that this concept is completely fallacious and that such fallacy is demonstrated by the following. In this case the trial court found that the shock waves from these atomic explosions were capable of extreme, erratic and uncontrollable destruction and property damage, and that similar tests had caused widespread damage [Pre-trial order, Par. 7, R. 13]. The court had further found that, as to each blast, the shock wave was uncontrollable and unpredictable under the existing circumstances [Finding XV, R. 29]. Appellant's Exhibits 31 and 34 are replete with official reported statements of the known intensity and dangerous character of the shock waves which experience had shown to be the results of such tests.

But in *Dalehite*, the Supreme Court stated (p. 42):

“There must be knowledge of a danger, not merely possible but probable * * *. Here, nothing so startling was adduced. The entirety of the evidence compels the view that FGAN was a material that former experience showed could be handled safely in the manner it was handled here. Even now no one has suggested that the ignition of FGAN was anything but a complex result of the inner acting factors of mass, heat, pressure and composition.”

It seems to the writer that it would be difficult to conceive of two cases in which the facts are so completely dissimilar.

Appellee asserts that the dissent in *Dalehite* was in basic agreement with the majority opinion. We disagree and illustrate such view with the following excerpts:

“The Government insists that each act or omission upon which the charge of negligence is predicated—involved a conscious weighing of expediency against caution and was therefore within the immunity for discretionary acts provided by the Tort Claims Act” (p. 57).

“The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down line there is immunity for every balancing of care against cost, of safety against production, of warning against silence” (p. 58).

Appellee asserts: (1) That governing bodies are not liable in tort for planning defects (Gov. Br. 22) and (2) that the government officials, themselves, cannot be held

liable (Gov. Br. 28-34). We make no such claims. Appellee further asserts (3) that appellant has failed to establish any departure or deviation from the plan (Gov. Br. 23, 43-47); (4) that the omissions of Dr. Cox were known to and concurred in by the Test Manager (Gov. Br. 24, 46) and were in the exercise of immune discretion (Gov. Br. 23, 47-53); that Dr. Cox gave several predictions of the probable blast pressure, only one of which was based on data obtained from the microbarographs (Gov. Br. 43, footnote 36 and p. 61) and (5) that it was the Test Manager and not Dr. Cox whom the appellant should have charged with negligence.

It would prolong this Reply Brief beyond permissible limits to detail and discuss all of the portions of the record which refute the foregoing assertions. We admit that the activities of Dr. Cox were known to and concurred in by the Test Manager but, as we have pointed out in our Opening Brief (App. Br. 11-12), the *plan* was to explode the bombs only when weather conditions were acceptable, the testing group had the means to make such determination and the authority to delay the explosions when such conditions did not exist. But the determination as to whether weather conditions "were, in fact, acceptable" could not be made in respect to areas which were 150 miles from the test site, except through the use of a microbarograph located in that direction [R. 266, 267, 268, 272-273, 291]. Such being the case, this record discloses, not an immune exercise of discretion, but a total failure to do an act which was a necessary predicate to the exercise of discretion. Here Dr. Cox had failed to make *any test*

or graph whatsoever in one of the four principal directional points of the compass.

It is immaterial whether the other members of the test organization joined in such negligence because it is the government (which can only act through agents) which is the responsible party here. It is well settled that there is no requirement that appellant single out and identify the particular agent whose activities have created the government's liability. (*Pierce v. United States*, 142 Fed. Supp. 721, 733.)

While it is true that Dr. Cox gave other predictions as to probable blast pressure, his testimony clearly establishes that such predictions had and could have had no connection whatever with the effect of such pressures at a distance of 150 miles from the test site. We conclude by asking, if we accept the concept of appellee, where would one draw the line? If Cox, *et al.*, could, in the exercise of immune discretion and without departing or deviating from the plan completely omit microbarograph tests toward one of the four major compass directions, could he have also exercised immune discretion and not so deviate if he determined to omit tests to the east and to the west; or to the south, east and west; or in all directions upon the assumption that the shock waves would not reach areas 150 miles distant? We think not, nor do we believe that this court will so hold. The simple and complete answer is that Cox was *not* exercising discretion but was negligently omitting an act which should have been done before he could exercise the *limited* discretion allowed to him. We

paraphrase the comment in *Somerset Seafood Co. v. United States* (C. A. 4), 193 F. 2d 631, 635, which reads:

“There is certainly no discretion to mark a wreck in such way as to constitute a trap for the ignorant or unwary rather than a warning of danger.”

By stating:

“There was certainly no discretion to omit entirely a necessary act which was the only means by which a test could have been made upon which discretion could have been exercised in conformity with the plan, in such way as to be wholly unable to decide whether or not the proposed detonations should be made or postponed.”

And, as we have pointed out in our Opening Brief only *slight negligence* is required as a foundation for liability where the actor is engaged with explosive materials of the character here involved (App. Br. 10).

It is respectfully submitted that the judgment of the lower court should ^{be reversed} ~~be reserved~~ *with directions* to enter judgment in favor of appellant and against appellee in the sum of \$5,000.00 together with interest and costs.

Respectfully submitted,

IRL DAVIS BRETT,

Attorney for Appellant.

No. 15142

United States
Court of Appeals
for the Ninth Circuit

LEETA A. LLOYD,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

OCT - 2 1956

No. 15142

United States
Court of Appeals
for the Ninth Circuit

LEETA A. LLOYD,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Affidavit of Hatmaker, George E., in Opposition to Plaintiff's Cross-Motion for Summary Judgment	73
Exhibit A—Premium Card for Policy No. 1127042	76
Affidavit of O'Neil, Jack, in Opposition to Plaintiff's Cross-Motion for Summary Judgment	68
Exhibit B—Page 35 of Company's Rate Book Published in January, 1948	71
Exhibit C—Page 36 of Company's Rate Book Published in January, 1948	72
Answer	6
Exhibit A—Insurance Policy	8
Certificate of Clerk to Record on Appeal.....	98
Complaint	3
Counsel, Names and Addresses of.....	1
Deposition of O'Neil, Jack.....	85

INDEX	PAGE
Judgment	78
Memorandum in Support of Motion for Summary Judgment	67
Motion for Summary Judgment, Defendant's Affidavit of Frederick, R. A.....	60
Exhibit B—Copy of Receipt.....	62
Motion for Summary Judgment, Plaintiff's... Notice of	67
Notice of Appeal Filed March 27, 1956.....	68
Notice of Appeal Filed May 7, 1956.....	83
Notice of Motion to Vacate Judgment, Plaintiff's	85
Memorandum of Points and Authorities in Support of	79
Order Denying Plaintiff's Motion to Vacate Summary Judgment	80
Order Extending Time for Filing Record and Docketing Appeal	84
Order Granting Defendant's Motion and Denying Plaintiff's Motion for Summary Judgment	84
Reply of Defendant to Request for Admissions	77
Reply of Plaintiff to Request for Admissions..	55
Request of Defendant for Admissions by Plaintiff	59
Exhibit B—Letter Dated August 19, 1954	56
	58

INDEX	PAGE
Request of Plaintiff for Admissions by Defendant	49
Statement of Points on Which Appellant Intends to Rely	101
Transcript of Portion of Opening Statement for Plaintiff	96

NAMES AND ADDRESSES OF COUNSEL

NEIL CUNNINGHAM,

582 Market,
San Francisco, California;

C. W. RICKETTS,

131 West Main Street,
Los Gatos, California,

Counsel for Appellant.

McCUTCHEN, THOMAS, MATTHEW, GRIF-
FITHS AND GREENE,

351 California Street,
San Francisco, California,

Counsel for Appellee.

United States District Court, Northern District of
California, Southern Division

No. 34715

LEETA A. LLOYD,

Plaintiff,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

COMPLAINT BY BENEFICIARY FOR
AMOUNTS PAYABLE UNDER A LIFE
INSURANCE POLICY

Plaintiff, Leeta A. Lloyd, complains of defendant,
The Franklin Life Insurance Company, a corpora-
tion, and for cause of action alleges that:

I.

Plaintiff is a citizen of the State of California,
and defendant is a corporation incorporated under
the laws of the State of Illinois. The matter in con-
troversy exceeds, exclusive of interest and costs, the
sum of Three Thousand (\$3,000.00) Dollars.

II.

Heretofore defendant issued a policy of life in-
surance on the life of Warren William Lloyd bear-
ing number 112 7042; that said policy was issued
by defendant, and delivered to said Warren Wil-
liam Lloyd by an agent of defendant duly author-
ized therefor in the State of California.

Plaintiff is the beneficiary named in that policy. The said Warren William Lloyd died December 21, 1954, and at that time said policy was in full force and effect.

III.

The said Warren William Lloyd was born May 14, 1920.

IV.

By the terms of that policy, in the part designated Double Benefit, defendant promised and agreed to pay to plaintiff the sum of Three Thousand (\$3,000.00) Dollars upon the death of the said Warren William Lloyd, in accordance with certain optional methods of settlement. Plaintiff elects option one and to receive the said Three Thousand (\$3,000.00) Dollars in one year in one sum.

V.

Defendant further agreed by the terms of said policy, in that part thereof denominated Supplemental Agreement, to pay to plaintiff the further and additional sum of Ninety-four Hundred (\$9,400.00) Dollars upon the death of said Warren William Lloyd.

VI.

Defendant has denied all liability on said policy and has refused to pay part of the said sum of Three Thousand (\$3,000.00) and has refused to pay any part of said sum of Ninety-four Hundred (\$9,400.00) Dollars. Defendant has offered to repay to plaintiff the premiums which defendant alleges were paid for that policy. Plaintiff rejects that

offer and does hereby offer to return to defendant the check mailed to plaintiff in the amount which defendant alleges is the amount of premiums paid for said policy. Said check is number 113689, is drawn by defendant payable to plaintiff, is dated January 26, 1955, and is in the amount of Two Hundred Eighty-eight Dollars and Thirty-two Cents (\$288.32).

Wherefore, Plaintiff prays for judgment against defendant as follows:

1. Under the Double Benefit part of said policy, the sum of Three Thousand (\$3,000.00) Dollars, plus interest thereon as provided by law.

2. Under the Supplemental Agreement part of said policy the sum of Ninety-four Hundred (\$9,400.00) Dollars plus interest thereon as provided by law.

3. For costs and for such general relief as may be proper.

Dated at Los Gatos, California, June 14, 1955.

NEIL CUNNINGHAM,
C. W. RICKETTS,
Attorneys for Plaintiff,

By /s/ C. W. RICKETTS.

Duly verified.

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

ANSWER

Defendant, for its answer:

First Defense

1. Admits the allegations of paragraphs I and II.

2. Admits the allegations of paragraph III except states it is without knowledge or information sufficient to form a belief as to the birth date of the insured.

3. Denies each and every allegation of paragraphs IV and V except admits that on January 5, 1953, it issued its policy number 1127042, copy of which is attached hereto as Exhibit A.

4. Admits the allegations of paragraph VI except denies that it has denied all liability under said policy and alleges that its liability is restricted to the amount of premiums paid under said policy.

Second Defense

Alleges that the complaint fails to state a claim upon which relief can be granted.

Third Defense

1. Alleges that on January 5, 1953, it issued its insurance policy number 1127042, copy of which is attached hereto as Exhibit A, to take effect as of January 1, 1953.

2. Alleges that said policy provides:

“Suicide: If within two years from date of issue the Insured (whether sane or insane) shall die by self-destruction, the liability of the Company shall be restricted to the amount of premiums paid hereon.”

3. Alleges that it fixed the effective date of issue of said policy in accordance with the special request of the insured contained in his application for said policy, copy of which application is a part of Exhibit A.

4. Alleges that the insured died by self-destruction on December 21, 1954.

5. Alleges that such death occurred within two years of January 1, 1953, the date of issue of said policy.

Wherefore, defendant demands judgment: (1) dismissing the complaint; (2) for costs and disbursements; and (3) for such other and further relief as may be deemed proper.

August 1, 1955.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,

/s/ MORRIS M. DOYLE,

/s/ BERNARD PETRIE,

Attorneys for Defendant.

EXHIBIT A

[Stamped]: Specimen—No. 1127042.

The Franklin Life Insurance Company
Springfield, Illinois

Name of Insured: Warren William Lloyd.

Age of Insured: 33.

Double Benefit: Three Thousand Dollars.

Principal Sum Insured: One Thousand Five
Hundred Dollars.

Annual Premium: \$136.63.

Premiums Payable During: Lifetime of the Insured.

First Policy Year Begins: January 1, 1953.

Beneficiary: Leeta A. Lloyd, Wife.

The Franklin Life Insurance Company agrees to pay the Double Benefit under the conditions hereof to the beneficiary upon receipt of due proof of the death of the Insured if the Insured shall die before the end of the policy year on which the Insured's age nearest birthday is 65 years (which is the end of the Double Benefit period). If the Insured shall die after the end of the Double Benefit period, the amount payable to the beneficiary upon receipt of due proof of the death of the Insured will be the Principal Sum Insured.

This Policy is issued and accepted subject to all the conditions, benefits and privileges set forth on the subsequent pages hereof, which are hereby made a part of this Contract.

In Witness Whereof, The Franklin Life Insurance Company has caused this Policy to be executed at Springfield, Illinois, January 5, 1953.

/s/ CHARLES E. DECKER,
President.

/s/ GEORGE E. HATMAKER,
Secretary.

Countersigned:

.....,
Registrar.

Preferred Risk—Ordinary Life
Double Insurance to Age 65

Participating—Annual Dividends
Premiums payable for Life

With Additional Insurance for Mortgage Liquidation Double Indemnity—Waiver of Premium Disability.

Form 908

Consideration: This insurance is granted in consideration of the application herefor and of the payment in advance of the premiums as herein provided. The first premium in the amount specified on the first page, is payable at the beginning of the first policy year and subsequent premiums are paya-

ble on the anniversary of said date in every year thereafter until premiums have been paid for the period specified on the first page.

Premiums: This Policy is based upon the payment of premiums annually in advance but premiums for the first and subsequent policy years may be paid semi-annually or quarterly in advance or, at the option of the Company, they may be paid monthly in advance. Each semi-annual, quarterly or monthly premium shall be in accordance with the rates in use by the Company at date of issue hereof. Premiums are payable at the Home Office of the Company in the City of Springfield, Illinois, or to an authorized agent in exchange for the Company's receipt therefor, signed by the President or Secretary, and countersigned by such authorized agent. Failure to pay any premium when due shall cause this Policy to cease and determine except as herein otherwise provided, and all payments made hereon shall remain the property of the Company.

Grace Period: A grace period of thirty-one days, without interest charge, will be allowed for the payment of every premium after the first, during which period this Policy shall remain in force. If death occurs within the grace period, the premium, if unpaid, will be deducted from the amount payable hereunder.

Reinstatement: This Policy may be reinstated (unless previously surrendered to the Company) at any time within five years after default in payment of any premium after the first upon written

application to the Company and presentation at the Home Office of evidence of insurability of the Insured satisfactory to the Company and payment of all past due premiums with interest thereon at the rate of 5% per annum from their respective due dates. Any indebtedness hereon at date of such premium default, with interest from such date according to the terms of the obligation therefor, shall be restored and be a first lien against this Policy; provided, however, that the excess, if any, of such indebtedness over the loan value of this Policy as at date of reinstatement shall be repaid forthwith.

Incontestability: After two years from date of issue this Policy shall be incontestable except for failure to pay premium when due and except for violation of the conditions of this Policy relating to military or naval service in time of war if such service shall be restricted by rider attached hereto at date of issue; provided, however, that the provisions for disability benefits and double indemnity benefits, if any, attached to or incorporated in this Policy shall become void and cease to be in force for the causes and under the conditions as stated therein.

Suicide: If within two years from date of issue the Insured (whether sane or insane) shall die by self-destruction, the liability of the Company shall be restricted to the amount of premiums paid hereon.

Beneficiary: The Beneficiary is the party designated to receive the death benefit. Unless otherwise

stated, the relationship of the Beneficiary is the relationship to the Insured. Unless otherwise provided herein, if any Beneficiary is designated as primary or contingent, the death benefit hereunder shall be payable in equal shares to such primary Beneficiaries as are living at the death of the Insured, or if no primary Beneficiary is then living, the death benefit shall be payable in equal shares to the then surviving first contingent Beneficiaries, but if no first contingent Beneficiary is then living, the death benefit shall be payable in equal shares to the then surviving second contingent Beneficiaries. If no Beneficiary shall survive the Insured, the Policy shall be payable to the Insured's executors, administrators or assigns. As to any facts relating to the identity or dates of birth and death of any Beneficiary hereunder, the Company may rely upon evidence by affidavit or otherwise, and any payment made in reliance thereon shall relieve the Company of its liability to the extent of such payment. To the extent permitted by law, the proceeds hereof at the death of the Insured shall not be subject to transfer or encumbrances by any Beneficiary and shall not be subject to the claims of creditors of any Beneficiary not to any legal process against any Beneficiary. Subject to the rights of any assignee, any Beneficiary named herein may be changed at any time during the continuance of this Policy by filing at the Home Office of the Company a written request therefor. Such change shall take effect only upon its endorsement on the Policy by the Company

at its Home Office but upon such endorsement the change will relate back to, and take effect as of, the date said written notice of change was signed whether the Insured be living at the time of such endorsement or not, but without prejudice to the Company on account of any payments made by it before receipt of such written notice at its Home Office.

Modification: Only the President or Secretary has power in behalf of the Company (and then only in writing) to make or modify this or any contract of insurance, or to extend the time for paying any premium, and the Company shall not be bound by any promise or representation heretofore or hereafter given by any agent or person other than the above.

Age: If the age of the Insured is misstated, the amount payable hereunder shall be such as the premium paid would have purchased under this Policy at the true age of the Insured.

Assignment: No assignment of this Policy shall be binding upon the Company unless filed in duplicate at the Home Office, one to be retained by the Company and the other to be returned. The Company assumes no responsibility for the validity of any assignment.

Indebtedness: This Policy is payable at the Home Office of the Company in Springfield, Illinois. Before any amount shall be paid hereunder, proof of the interest of the claimant must be furnished

and any indebtedness hereon to the Company must be settled.

Entire Contract: This Policy and the application therefor, a copy of which is hereto attached and made a part hereof, constitute the entire contract between the parties. All statements made by the Insured or on his behalf shall, in the absence of fraud, be deemed representations and not warranties, and no such statements shall be used in defense to a claim under this Policy unless it is contained in the application and a copy of the application is attached to this Policy when issued.

Automatic Premium Loan: If proper written request for the operation of this provision has been received at the Home Office of the Company before default in payment of any premium or within the grace period, any premium due on this Policy remaining unpaid on the last day of grace for payment of same will be advanced by the Company, provided the cash value of this Policy at the end of the period which such premium would cover exceeds the total indebtedness to the Company hereon by an amount sufficient to pay such premium with interest thereon. The amount of such advanced premium with interest thereon at the rate of 5% per annum to the next succeeding anniversary of this Policy shall constitute a loan against this Policy and thereafter such loan shall bear interest at the rate of 5% per annum payable in advance. If such interest is not paid when due it shall be added to such loan and bear interest at the same rate. If the

cash value of this Policy at the end of any period for which a premium is due and unpaid does not exceed the total indebtedness hereon by an amount sufficient to pay such premium with interest thereon, then such due and unpaid premium shall not be advanced as a loan but the provision of this Policy entitled "Non-forfeiture" shall apply. The Company shall have a prior lien on this Policy and its proceeds for any loans made hereunder together with interest thereon. At any time before default in payment of premium, the payment of premiums in cash to the Company may be resumed in accordance with the provisions of this Policy. The request for the operation of this provision may be revoked at any time by proper written request to the Company at its Home Office, provided, however, that such revocation shall not affect any loan which may have been previously made hereunder.

Loans: Loans may be obtained on the sole security of this Policy at any time that a cash surrender value is available and while the Policy is in force otherwise than as extended insurance. The loan may be for any amount which with interest to the end of the current policy year shall not exceed the cash value at the end of such policy year. Loans will be made upon execution of a proper loan agreement and assignment of this Policy and presentation of this Policy at the Home Office of the Company for endorsement or deposit as the Company may require. Any existing indebtedness on this Policy and any unpaid balance of the premium for

the current policy year shall be deducted by the Company from the proceeds of the loan. Interest on the loan shall be at the rate of 5% per annum payable in advance to the end of the current policy year and annually in advance thereafter, and if any interest is not paid when due it shall be added to the existing loan and shall bear interest at the same rate. The whole or any part of any indebtedness may be repaid at any time before default in payment of premium. Failure to repay any loan or to pay interest thereon shall not avoid this Policy unless the total indebtedness shall equal or exceed the loan value of this Policy nor until thirty-one days after notice to that effect shall have been mailed by the Company to the last known address of the Insured, and any Assignee of record at the Home Office of the Company.

Deferment: The Company reserves the right to defer the payment of any cash value or the granting of any loan hereunder, unless for the purpose of paying premiums due under any policies in the Company, for the period permitted by law but not to exceed six months after written request is received by the Company at its Home Office.

Reserve Basis: The reserves on this Policy shall be computed by the Commissioners Reserve Valuation Method and the Commissioners 1941 Standard Ordinary Mortality Table with 3% interest. The values shown in the Table of Non-Forfeiture and Loan Values for the third and subsequent years and the values for the years subsequent to the 20th

policy year, if the policy continues in force for more than twenty years, are equal to said reserve less an amount not exceeding $2\frac{1}{2}\%$ of the amount insured. At the end of the premium paying period and thereafter the cash value shall be equal to said reserve.

Control: Unless otherwise provided in the application herefor, or by endorsement hereon, and subject to the rights of any assignee of record with the Company, and insofar as the laws of the State governing this Policy allow, the Insured during his lifetime may assign or surrender this Policy and exercise, receive and enjoy every other right, benefit or privilege contained in this Policy, or agree with the Company to any change in or amendment to this Policy, without the consent or joinder of any beneficiary.

Annual Dividends: At the end of the second and each succeeding policy year, this Policy, while in full force or while being continued as Paid-Up Life or Endowment insurance under the Non-Forfeiture Provision, shall be credited with such share of the divisible surplus from the participating business as determined and apportioned by the Company. Such dividends shall, at the option of the Insured, be

1. Used to reduce the cost, either (a) by withdrawal in cash, or (b) by application toward payment of premiums; or,
2. Left to accumulate as an interest-bearing savings fund at such rate of interest as may be determined from time to time by the Company, but guar-

anteed to be not less than 3% per annum compounded on an annual basis. Unless previously applied in accordance with the Non-Forfeiture Provision hereof, such accumulated dividends shall be payable at the maturity of this Policy but withdrawable on demand; or,

3. Applied to increase the amount of insurance by the purchase of paid-up participating additions to this Policy, and unless previously applied in accordance with the Non-Forfeiture Provisions hereof, such paid-up additions may be surrendered at any time for their cash value which shall be equal to the then present value of the guaranteed benefits provided thereunder but not less than the amount of dividends applied to purchase such additions; or

4. Applied to convert this policy into a fully paid-up participating policy, or to mature this Policy as an endowment, or to shorten the endowment period of this Policy.

Whenever the cash value of this Policy and any existing paid-up additions plus the dividend accumulations equal the net single premium (calculated on the same basis as the premium for this Policy) at the then attained age of the Insured for a fully paid-up participating policy of the same kind and amount insured as this Policy, the Company will, upon written request and proper release of the paid-up additions and dividends accumulations, convert this Policy into such a fully paid-up participating policy. Any indebtedness outstanding

against this Policy will continue as a lien against the paid-up policy.

Whenever the cash value of this Policy and of any existing paid-up additions together with any dividend accumulations equal the amount insured under this Policy, the Company will upon due surrender of this Policy and release of such paid-up additions and dividend accumulations pay the amount insured under this Policy less any existing indebtedness to the Company thereon.

Unless the Insured shall elect otherwise, within thirty-one days after any dividend is due, the dividend shall be applied to the purchase of a paid-up participating addition to the amount insured, or applied under such other automatic options as may be required by the laws of the State in which this Policy is delivered.

Non-Forfeiture: In event of default in payment of premium, one of the following benefits shall apply:

1. **Automatic Extended Insurance:** This Policy will, without action of the Insured or payment of further premiums, be continued as non-participating paid-up term insurance without loan values, for the principal sum insured, increased during such part of the paid-up term period as falls within the double benefits period specified on the first page hereof by an additional sum equal to the principal sum insured, for such a period reckoning from the due date of the unpaid premium as the then cash value of this Policy will purchase at the Insured's

then attained age at net single premium rates by the Commissioners 1941 Standard Ordinary Mortality Table with interest at the rate of 3% per annum. If this Policy is being continued as extended insurance which became effective at the end of the third or any subsequent policy year, then the Company will pay, upon legal surrender of this Policy within thirty days after the end of any policy year, a cash surrender value equal to the full reserve according to the mortality table and interest rate specified in this paragraph for the unexpired period of such paid-up term insurance.

2. Paid-Up Insurance: In lieu of the paid-up term insurance provided for in paragraph 1 above, upon the Insured's written request and legal surrender of this Policy within sixty days from the due date of the unpaid premium, the Company will issue a participating paid-up life policy for such amount as the then cash value of this Policy will purchase at the Insured's then attained age at net single premium rates by the Commissioners 1941 Standard Ordinary Mortality Table with interest at the rate of 3% per annum. For any paid-up life insurance which is issued under this provision at the end of the third or any subsequent policy year, the Insured may obtain a loan of an amount not greater than the reserve for such paid-up life insurance, subject to the loan provisions thereof, or may surrender such insurance within thirty days after the end of any policy year for its reserve according to the mortality table and interest rate specified in this paragraph and less any indebtedness hereon.

3. **Cash Surrender Value:** In lieu of the paid-up term insurance provided for in paragraph 1 above, upon the Insured's written request and legal surrender of this Policy within sixty days from the due date of the unpaid premium, the Company will pay the cash value hereinafter specified. If this Policy shall have become paid-up by completion of all premium payments, then upon the Insured's written request and legal surrender of this Policy within thirty days after the end of any policy year, the Company will pay the cash value hereinafter specified.

4. **Basis of Cash Value:** The cash value at the end of any policy year is computed as the excess of the then present value of the life insurance benefits provided by this Policy, assuming all death claims payable at the end of the policy year of death, over the then present value of an annual amount for the remaining period during which premiums are payable under this Policy, all on the basis of the Commissioners 1941 Standard Ordinary Mortality Table with interest at the rate of 3% per annum, which annual amount is equal to the net level premium applicable to this Policy on said basis, multiplied by the non-forfeiture factor which is set forth in the Table of Non-Forfeiture Factors below. Such excess shall be increased by the present value of any dividend additions and any dividend accumulations and shall be decreased by any indebtedness to the Company hereon. The net value of any dividend additions shall be not less than the dividends used to

purchase such additions. The life insurance benefits specified herein shall not include (a) any provision for total and permanent disability or for additional benefits, if any, for death by accidental means, or, (b) any decreasing term insurance benefits provided by a rider attached to and forming a part of this Policy.

5: Explanation of Table of Non-Forfeiture and Loan Values: The values shown in the Table of Non-Forfeiture and Loan Values hereof are for completed policy years and are computed on the assumption that the Policy has been in force and premiums duly paid for the number of years stated, and that there are no paid-up additions or dividend accumulations credited to this Policy and that there is no indebtedness to the Company hereon. The tabular amounts of paid-up and extended insurance are equal in value to the corresponding cash values. If the premiums on this Policy shall be paid other than annually, due allowance will be made in computing cash and non-forfeiture values for that portion of the policy year for which premiums shall have been paid. If this Policy continues beyond the last policy year for which values are shown in such table, values for such year shall be computed on the same basis as above provided and will be furnished upon request. The cash surrender values and paid-up non-forfeiture benefits available under this Policy are not less than the minimum values and benefits required by or pursuant to any applicable statute of the State in which the policy is delivered.

Table of Non-Forfeiture Factors

	Factor	Age	Factor	Age	Factor	Age	Factor	Age	Factor
5	1.108422	26	1.092685	37	1.083251	48	1.081229	59	1.070819
6	1.106747	27	1.091558	38	1.082734	49	1.081492	60	1.069623
7	1.105117	28	1.090481	39	1.082280	50	1.081841	61	1.068474
8	1.103538	29	1.089458	40	1.081887	51	1.082145	62	1.067368
9	1.102008	30	1.088488	41	1.081559	52	1.080547	63	1.066306
0	1.100525	31	1.087573	42	1.081297	53	1.079004	64	1.065286
1	1.099092	32	1.086712	43	1.081104	54	1.077513	65	1.064307
2	1.097710	33	1.085906	44	1.080979	55	1.076075		
3	1.096378	34	1.085155	45	1.080927	56	1.074687		
4	1.095097	35	1.084463	46	1.080949	57	1.073349		
5	1.093865	36	1.083827	47	1.081049	58	1.072060		

Total Disability Benefit—Waiver of Premiums

Supplemental Agreement attached to and forming
part of the Policy described herein.

Policy Number: 1127042.

Name of Insured: Warren William Lloyd.

Extra Annual Premium: \$4.88 for twenty years and
\$2.48 thereafter.

If Due Proof shall be furnished to The Franklin Life Insurance Company at its Home Office that, after the payment of the first premium on said Policy, and before default in payment of any subsequent premium, and before the anniversary of said Policy on which the Insured's age at nearest birthday is sixty years, the Insured has become totally disabled, as the result of bodily injury or disease occurring after the issuance of said Policy,

so that the Insured is and will be continuously and wholly prevented thereby from performing any work or transacting any business for compensation or profit and that such disability has already continued uninterruptedly for a period of at least six months (such disability of such duration being treated as permanent only for the purpose of determining the commencement of the benefit hereunder) the Company will during the continuance of such disability grant the following benefit:

Waiver of Premium: The Company agrees to waive the payment of each premium becoming due under said Policy after the commencement of such disability, provided however, that no premium shall be waived, the due date of which is more than six months prior to the date of receipt at the Home Office of the Company of written notice of claim hereunder. Any premiums so waived shall not be deducted from the sum payable in any settlement of said Policy. During the continuance of disability the manner of premium payments may not be changed.

Recognized Disabilities: It is further agreed that the entire and irrecoverable loss of sight of both eyes, or the total and permanent loss by accident or disease of the use of both hands, or of both feet, or of one hand and one foot, will be treated in the same manner as total disability within the operation of this Agreement.

Requirements for Due Proof: In case any premium under said Policy is in default before receipt

at the Home Office of the Company of written notice of claim hereunder, waiver of premium hereunder shall be made only if such notice is received within six months of the due date of the first premium in default, and either (a) the total disability for which claim is made commenced prior to the due date of the first premium in default, or (b) the total disability for which claim is made commenced subsequent to the due date of the first premium in default, but within the grace period allowed by said Policy for payment of such premium, in which case, however, the Insured shall be liable to the Company for such premium in default with interest at 5% per annum, which amount may be deducted from any payments due under said Policy.

Written notice of claim hereunder must be presented to and received at the Home Office of the Company (a) during the lifetime of the Insured and (b) during the continuance of total disability, otherwise the claim shall be invalid. Failure to give such notice within such times shall not invalidate any such claim if it shall be shown that it was not reasonably possible to give such notice within such times and that such notice was given as soon as was reasonably possible.

Recovery from Disability: Notwithstanding that proof of disability may have been accepted by the Company as satisfactory, the Company may from time to time demand due proof of the continuance of such disability and shall be permitted, as often as it may require, to have a physical examination

of the Insured made with respect to such disability by a medical examiner designated by it. After such disability has continued for two full years the Company will not demand such proof more often than once a year. If the Insured shall fail to furnish such proof, or refuse to permit such physical examination, or shall become able to perform any work or engage in any business or occupation whatsoever for compensation or profit, waiver of premium hereunder provided shall immediately cease and all premiums thereafter falling due shall be payable according to the terms of said Policy.

Risks Not Assumed: The benefit herein provided shall not be granted if disability shall result (a) from intentional self-inflicted injury, or (b) from the special hazards incident to service in the military, naval or air forces of any country, combination of countries or international organization at war, whether such war be declared or undeclared, or (c) from an act of war or act attributable to war whether such war be declared or undeclared.

Termination: This Agreement for disability benefit shall automatically terminate, (a) if any change is made in the plan or principal sum insured of said Policy, except that in such event a new disability Agreement may, at the option of the Company be attached to the re-written Policy, subject to the adjustment of the premium therefor, or (b) if said Policy shall by reason of default in payment of premium be continued in force under any non-forfeiture

ture provision thereof. Upon written request by the Insured, accompanied by said Policy for endorsement, this Agreement for disability benefit may be discontinued.

Premiums: The extra annual premium for this Supplemental Agreement is included in the premium stated in said Policy. This extra premium will not be payable on or after the anniversary of said Policy on which the Insured's age at nearest birthday is sixty years, or after this Agreement for disability benefit has been terminated or discontinued as above provided. Any extra premium, or part thereof, paid under this Supplemental Agreement for any period subsequent to the termination hereof will be refunded.

In Witness Whereof The Franklin Life Insurance Company has caused this Supplemental Agreement to be executed at Springfield, Illinois, concurrently with said Policy to which it is attached.

/s/ CHARLES E. DECKER,
President.

/s/ GEORGE E. HATMAKER,
Secretary.

Countersigned:

.....

Registrar.

Double Indemnity—Accidental Death Benefit
Supplemental Agreement attached to and forming
part of the Policy described herein.

Policy Number: 1127042.

Name of Insured: Warren William Lloyd.

Accidental Death Benefit: \$3,000.00.

Extra Annual Premium: \$4.50.

Benefit: Subject to the provisions and exceptions herein contained, The Franklin Life Insurance Company will pay

An Accidental Death Benefit

of the amount stated above in addition to the amount payable upon the death of the Insured as provided in said Policy provided however, the amount payable shall be Two Hundred Fifty Dollars (\$250) for each One Thousand Dollars (\$1,000) of Accidental Death Benefit set forth above if the death of the Insured shall occur (1) during the period covered in any Short Term Insurance Agreement attached to said Policy when the Insured's age at the beginning of said Short Term Insurance period is less than six months, or (2) during the first policy year of said Policy if the Insured is under the age of one year nearest birthday at the beginning of said policy year.

Such Accidental Death Benefit shall be due and payable only if the Company shall receive due proof: (1) that such death occurred while said

Policy was in force and there was no default in the payment of any premium thereunder; (2) that the death of the Insured resulted, directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means; (3) that there was evidence of such injuries by a visible contusion or wound on the exterior of the body, except in case of drowning or of internal injuries revealed by an autopsy; (4) that such death occurred prior to the anniversary of said Policy on which the Insured's age nearest birthday was sixty years and within ninety days from the date of the accident. The Company, before making any payment hereunder, shall have the right and opportunity to examine the body and make an autopsy, unless forbidden by law.

Risks Not Assumed: This Accidental Death Benefit shall not be payable if the death of the Insured shall result either directly or indirectly from, (1) self-destruction, whether sane or insane, or (2) committing or attempting to commit an assault or felony, or (3) participating in a riot or insurrection, or (4) the special hazards incident to service in the military, naval or air forces of any country, combination of countries, or international organization at war, whether such war be declared or undeclared, or (5) an act of war or act attributable to war whether such war be declared or undeclared, or (6) operating, riding in or descending from any kind of aircraft, whether as a passenger or otherwise, except riding as a fare-paying passenger in a

licensed passenger aircraft provided by an incorporated passenger carrier on a scheduled passenger air service regularly offered over an established passenger route, or (7) being or having been in or on any submarine vessel, or (8) bodily or mental infirmity or illness or disease of any kind, or (9) any poison, gas or fumes, voluntarily or involuntarily, accidentally or otherwise taken, administered, absorbed or inhaled, or (10) infection, other than infections occurring simultaneously with and in consequence of an accidental cut or wound, or (11) if the death of the Insured shall occur while any premium is being waived under any disability benefit attached to or incorporated in said Policy.

Termination: This Supplemental Agreement shall immediately terminate, (1) if any change shall be made in the plan or principal sum insured of said Policy, except that in such event a new Agreement for Double Indemnity may, at the option of the Company, be attached to the rewritten Policy, subject to an adjustment of the premium therefor, or (2) if said Policy shall by reason of default in payment of premium be continued in force under any non-forfeiture provision thereof. Upon written request by the Insured, accompanied by said Policy for endorsement, this Agreement for Accidental Death Benefit may be discontinued.

Premiums: The extra annual premium for this Supplemental Agreement is included in the premium stated in said Policy. Any premiums payable under said Policy on or after the anniversary

thereof on which the Insured's age at nearest birthday is sixty years, or after this Supplemental Agreement has been terminated shall be reduced by the amount of said extra premium. Any extra premium, or part thereof, paid under this Supplemental Agreement for any period subsequent to the termination hereof will be refunded.

In Witness Whereof The Franklin Life Insurance Company has caused this Supplemental Agreement to be executed at Springfield, Illinois, concurrently with said Policy to which it is attached.

/s/ CHARLES E. DECKER,
President.

/s/ GEORGE E. HATMAKER,
Secretary.

Countersigned:

.....

Registrar.

Provision for Additional Insurance Adapted to
Mortgage Redemption Purposes.
20 Year Plan

Supplemental Agreement attached to and forming part of Policy No. 1127042 issued by The Franklin Life Insurance Company on the life of Warren William Lloyd, the Insured.

If the Insured shall die prior to the end of the twentieth policy year of said Policy, and while said

policy and this Supplemental Agreement are in full force, then upon receipt by the Company of due proofs of the death of the Insured the Company will pay to the Beneficiary in addition to the principal sum insured stated on Page 1 of said Policy—10.0—times the amount specified in the following table for the policy year in which death occurs.

Policy Year	Additional Insurance	Policy Year	Additional Insurance	Policy Year	Additional Insurance	Policy Year	Additional Insurance	Policy Year	Additional Insurance
1	\$1000	5	\$880	9	\$735	13	\$580	17	\$420
2	970	6	840	10	700	14	540	18	380
3	940	7	805	11	660	15	500	19	340
4	910	8	770	12	620	16	460	20	300

This Supplemental Agreement for additional insurance shall automatically terminate under the following conditions:

(a) At the end of the twentieth policy year of said Policy.

(b) If any change is made in the plan or principal sum insured of said Policy, except that in such event a new Supplemental Agreement may, at the option of the Company, be attached to the rewritten Policy, subject to adjustment of the premium therefor.

(c) If said Policy shall, by reason of default in payment of premium be continued in force under any non-forfeiture provision thereof.

(d) Upon default in payment of the premium required for this Supplemental Agreement.

Upon written request of the Insured accompanied by said Policy for endorsement, this Supplemental Agreement for additional insurance may be discontinued.

This Supplemental Agreement is issued at a low cost guaranteed rate and the insurance provided hereby will not share in the surplus earnings of the Company.

The reserve for the benefit provided by this Supplemental Agreement is computed according to the Commissioners 1941 Standard Ordinary Table of Mortality with interest at the rate of 3% per annum.

The additional benefits provided by this Supplemental Agreement and any reserve on account of such additional benefits are expressly excluded and shall not be considered in determining the Non-Forfeiture or Loan Values provided for in said Policy nor in the amount of insurance or credits allowed under any exchange provision of said Policy. In case said Policy is exchanged for another form of policy there will be no credits or debits on account of premiums which have already been paid under this Supplemental Agreement.

The extra annual premium for this Supplemental Agreement is Seventy and 10/100 Dollars, which is included in the premium stated in said Policy. Any premiums payable under said Policy on or after the end of the twentieth policy year or after this Supplemental Agreement has been terminated shall be reduced by the amount of said extra premium.

18. Have you ever used any alcoholic stimulant to excess or intoxication or have you ever taken or

Any extra premium, or part thereof, paid under this Supplemental Agreement for any period subsequent to the termination hereof will be refunded upon request.

This Supplemental Agreement shall be subject to all the conditions and privileges contained in said Policy, except as herein provided.

In Witness Whereof The Franklin Life Insurance Company has caused this Supplemental Agreement to be executed at Springfield, Illinois, January 5, 1953.

/s/ CHARLES E. DECKER,
President.

/s/ GEORGE E. HATMAKER
Secretary.

Countersigned:

.....

Registrar.

Application Part Two, to The Franklin Life Insurance Company of Springfield, Illinois.

Answers must be made and signed by the Proposed Insured in the presence of the Medical Examiner, the Examiner to record in his own handwriting the answers of the Proposed Insured to every question. Examinations must be made in private.

1. Full name:

Warren William Lloyd.

Date of birth:

May 14, 1920.

2. For how much insurance are you applying?

\$13,000.

3. Residence:

1464 Maxine St., San Jose.

Has change of residence or occupation ever been sought or advised for the benefit of your health?

No.

4. Have you gained or lost weight during the past two years? If so give pounds lost or gained and full details:

Lbs. lost 0 lbs., gained 0.

5. Have you been associated with a tuberculous person during the past year?

No.

6. Have you ever piloted an airplane, received instructions in flying or do you contemplate so doing?

No.

7. When did you last consult a physician or surgeon and for what?

Date: 1942.

Name of physician?

U. S. Army.

Illness?

Malaria.

Duration of illness?

On and off, one year—well, released, 1943.
Have you ever consulted such physician at any other time? If so, give date and details.

No.

Each question must be read, and answered "Yes" or "No," the particular disease or symptom underlined and details given in question No. 24 below. Ditto marks and "o" not acceptable.

8. Have you ever had impairment of sight or hearing or chronic discharge from the ear? Skin disease?

No.

9. Have you ever had pain in the chest, palpitation, shortness of breath, heart attack, heart murmur, high blood pressure, varicose veins or any other disease of the heart or blood vessels?

No.

10. Have you ever had tuberculosis, spitting of blood, asthma, frequent cough or hoarseness, pleurisy, or any other disease of the chest or lungs?

No.

11. Have you ever had indigestion, stomach, or duodenal ulcer, appendicitis, frequent diarrhea, gallstones, jaundice, fistula, rupture, or any other disease of the stomach, intestines or liver?

No.

12. Have you ever had kidney colic or stone, dropsy, albumin, pus, blood or sugar in the urine, or any other disease of the kidneys, bladder or genital organs?

No.

13. Have you ever had frequent or severe headaches, dizziness, fainting spells, epilepsy, delirium tremens, convulsions, neuritis, sciatica, paralysis, nervousness, mental disorder, or any other disease of the brain or nervous system?

No.

14. Have you ever had malaria, acute rheumatic or any other type of fever, syphilis, gout or rheumatism, goitre, diabetes, cancer, tumor, sun-stroke or heat prostration, severe wounds or injuries?

Yes.

15. Have you ever had any special examination such as X-Rays, electrocardiogram, basal metabolism, blood sugar or any other blood or laboratory tests? (If so, state reason therefor with results and name and address of physician.):

No.

16. Within the last 5 years have you been advised to restrict your diet?

No.

17. Have you ever applied for disability or compensation benefits to any government or insurance organization?

No.

18. Have you ever been under observation or treatment in any hospital, asylum or sanitarium?

No.

19. How many days have you been absent from work on account of illness during the past 2 years?

None.

20. Have you now any disease, ailment, injury, disorder, infirmity or deformity?

No.

21. If discharged from Service, were you given a medical discharge?

No.

22. Have you within 5 years consulted any physician not included in any of above answers?

No.

24. In regard to those answered "Yes" above, give full particulars below.

Disease or Injury: Malaria.

Number of Attacks: Several.

Date: 1942.

Duration: 1943.

Severity: Moderate.

Results: Well.

Name and Address of Attending Physician:

U. S. Army.

I hereby certify that my answers are correctly recorded and agree that they shall form Part Two of my pending application for insurance, and also of

any subsequent application by me for insurance in this Company unless I then undergo another medical examination which by its terms is made a part of such application and of subsequent application.

I hereby expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician, clinic, hospital, or any other person who has attended or examined me, or who may hereafter attend or examine me from disclosing any knowledge or information thereby acquired by him and I expressly authorize such physician, clinic, hospital or other person to make such disclosures. A photostatic copy hereof shall be as valid as the original.

Dated this 11th day of Dec., 1952.

/s/ WARREN W. LLOYD,
Signature in Full of
Proposed Insured.

Witness:

/s/ ELLIOT G. SCHNEIDER, M.D.,
Medical Examiner.

1127042

Application to The Franklin Life Insurance
Company, of Springfield, Illinois

(Part 1.)

1. Name of Proposed Insured:

Warren William Lloyd.

2. Present Residence:

1464 Maxine St., San Jose, Santa Clara
County, Calif.

Business Address:

4311 El Camino Real, Santa Clara, Santa
Clara County, Calif.

Previous Residence:

640 Williw St., San Jose.

I have resided at present address 1 year. Send
all my mail to my residence.

3. a. Birth Place: Gypsum, Kansas.

b. Birth Date: March 14, 1920.

c. Age (nearest birthday): 33 Years.

4. Married: ☒

Sex—Male: ☒

Nationality: American

Race: White.

5. Description of Policy desired:

10,000 Mortgage Redemption.

a. Plan of Policy:

Ord. Life Double to age 65. See #26.

b. Amount of Insurance:

\$13,000. See #26.

Check Special Benefits Desired:

c. Premium Waiver Disability: ☒

d. Double Indemnity: ☒

Check (e) or (f) Below:

e. Participating: ☒

6 Is Automatic Premium Loan Provision Desired?

Yes.

7. Premiums to be paid:

Monthly.

8. Beneficiary:

Primary Beneficiary:

Leeta Adessa Lloyd.

Relationship to Proposed Insured:

Wife.

9. Insurance now in force on life if proposed insured?

None.

10. a. Occupation. Give job title and describe exact duties: Plumbing Contractor.

b. Name of Employer? W. M. Henderson.

c. Type of Business? Contracting.

d. Length of time in present occupation? Six.

e. Have you any other occupation or do you contemplate any change in occupation? No.

f. What was your immediate prior occupation?

U. S. Army.

11. Has any application for insurance upon your life or for reinstatement of your insurance ever been declined, postponed; rated up or limited? (If yes, when and what company?)

No.

12. Are you now negotiating for insurance, or have you within six months applied for insurance or reinstatement of insurance in any other company? (If yes, give details.)

No.

13. a. Have you within the last 5 years participated, do you now participate, or do you contemplate participating in aviation as: (1) Pilot or student pilot; (2) crew member; (3) flying of any kind for additional flight pay?

No.

14. Have you ever been rejected for military or naval service for physical defect? (If yes, give date and reasons.)

No.

15. If discharged from Service, were you given a medical discharge? (If yes, give complete details in 24 below if this application is non-medical.)

No.

16. Have any of your parents, brothers or sisters now, or ever had, apoplexy, insanity, tuberculosis or epilepsy? (If yes, give details.)

No.

17. Have you been associated with a tuberculous person during the past year? (If yes, give date and details.)

No.

been advised to take treatment for alcoholism?
(If yes, give full details.)

No.

19. Have you ever used opium, cocaine, chloral or any habit forming drug? (If yes, give details.)

No.

In giving causes of death or ill health, avoid all indefinite terms. State full details of health of those living particulars of association with proposed insured.

20. Family Record——Living——

Wife: Age 36, Health G.

Father: Age 74, Health F.

Mother: Age 67, Health F.

Brothers: Age 35, Health G.

Age 31, Health G.

Sisters: Age 37, Health G.

21. Is this insurance to be owned by a partnership, corporation, or any individual other than the proposed insured? (If so, give name and address and have owner join in execution of the application in space provided thereby below.)
application in space provided therefor below.)

No.

Complete the Following Questions Only if
Medical Examination Is Not Being Made

22. a. Give exact measurements as to height and weight with shoes and ordinary clothing.

5 ft., 10 in., 155 lbs.

- b. Have you gained or lost weight within the last two years? (If yes, give details.)

No.

23. Each question must be read, and answered "Yes" or "No," the particular disease or symptom underlined and details given in No. 24 below. Ditto marks, check marks and "O" not acceptable.

a. Have you ever had impairment of sight or hearing or chronic discharge from the ear?

No.

b. Have you ever had pain in the chest, palpitation, shortness of breath, heart attack, heart murmur, high blood pressure, varicose veins, or any other disease of the heart or blood vessels?

No.

c. Have you ever had indigestion, stomach or duodenal ulcer, appendicitis, frequent diarrhea, gallstones, jaundice, fistula, rupture, or any other disease of the stomach, intestines or liver?

No.

d. Have you ever had tuberculosis, spitting of blood, asthma, frequent cough or hoarseness, pleurisy, or any other disease of the chest or lungs?

No.

e. Have you ever had kidney colic or stone, dropsy, albumin, pus, blood or sugar in the urine, or any other disease of the kidneys, bladder or genital organs?

No.

f. Have you ever had frequent or severe headaches, dizziness, fainting spells, epilepsy, delirium tremens, convulsions, neuritis, sciatica

paralysis, nervousness, mental disorder, or any other disease of the brain or nervous system?

No.

g. Have you ever had malaria, acute rheumatic or any other type of fever, syphilis, gout or rheumatism, goitre, diabetes, cancer, tumor, sunstroke or heat prostration, severe wounds or injuries?

Yes.

h. Have you ever had any special examination such as X-Rays, electrocardiograms, basal metabolism, blood sugar or any other blood or laboratory tests? (If so, state reason therefor with results and name and address of physician.)

No.

i. Have you ever applied for disability or compensation benefits to any government or insurance organization?

No.

j. Have you ever been under observation or treatment in any hospital, asylum or sanitarium?

No.

k. How many days have you been absent from work on account of illness during the past 2 years?

None.

l. Have you within 5 years consulted, or been treated by, any physician, practitioner, hospital or clinic for any injuries or illness not included in your above answers?

No.

24. In regard to those answered "Yes" above, give full particulars below.

Disease or Injury: #9 Malaria.

Date: 1942.

Number of Attacks: 1.

Duration: 3 weeks.

Severity: Light.

Results: Complete recovery.

Name and Address of Attending Physician:
Army Hospital.

25. Use this space for special requests.

Date Policy Jan. 1, 1953.

26. Home Office Endorsements Only.

#5b. \$10,000 Mortgage Redemption for 20 yrs.
with \$1,500 Dble Ins. to 65.

There has been delivered to the agent the sum of \$12.57 in notes, on account of the first premium, (See agreements below.)

It Is Hereby Declared that all of the statements, representations and answers contained herein or given to the medical examiner, should examination be required, are full, complete and true. It is Hereby Agreed: (1) That no information acquired by any representative of the Company or medical examiner shall bind the Company unless it shall have been set forth in writing in this application and that no waiver or modification shall bind the Company unless in writing and signed by the President or Secretary; (2) That if the policy issued

hereon shall be on the participating plan then in any distribution of surplus or profit the principles and method which may be adopted by the Company for such distribution and its determination of the amount apportioned to any policy which may be issued on this application shall be and are hereby ratified and accepted; (3) That any policy issued hereon shall not take effect unless and until the policy has been delivered to the undersigned and the first premium paid during the lifetime and good health of the proposed insured (except as provided in the Receipt bearing the same number and date as this application if the entire first premium has been paid and acknowledged above and such receipt issued) in which event such policy shall be deemed effective as of the beginning of the first policy year as shown on such policy; (4) That the acceptance of any policy issued on this application will constitute a ratification by the undersigned of any corrections in or additions to this application made by the Company in the space provided for "Home Office Endorsements Only."

Any physician, clinic, or hospital is hereby authorized to disclose any information heretofore or hereafter acquired while attending the proposed insured in a professional capacity and if the Company desires to have an examination by its medical examiner the proposed insured hereby agrees to submit to such an examination. A photostatic copy hereof shall be as valid as the original.

Dated at San Jose, State of Calif., this 6th day of Dec., 1952.

/s/ WARREN W. LLOYD,
Signature of Proposed
Insured.

/s/ JACK O'NEIL,
Soliciting Agent.

/s/ A. B. CREBASSA,
General Agent.

Form 1305-1

For the Applicant's Benefit Get a Cash Settlement
for Full First Premium

No. 665143

1127042

[Specimen.]

The Franklin Life Insurance Company

Insurance on the Life of: Warren William Lloyd.
Policy No.: 1127042.

Double Benefit: \$3,000.00.

Principal Sum Insured: \$1,500.00.

The First Policy Year Begins: January 1, 1953.

Annual Premiums: \$136.63.

Semi-Annual Premiums: \$71.05.

Quarterly Premiums: \$36.04.

Monthly Premium: \$12.07.

Preferred Risk—Ordinary Life
Double Insurance to Age 65

Participating—Annual Dividends
Premiums Payable for Life

With Additional Insurance for Mortgage
Liquidation—Double Indemnity
Waiver of Premium Disability

[Endorsed]: Filed August 1, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS OF FACT PUR-
SUANT TO RULE 36 FEDERAL RULES
OF CIVIL PROCEDURE

To the Above-Named Defendant, The Franklin Life Insurance Company, a Corporation, and to Its Attorneys at Law, McCutchen, Thomas, Matthew, Griffiths & Greene:

The plaintiff, Leeta A. Lloyd, named in the above-entitled action, hereby requests, pursuant to the provisions of Rule 36, Federal Rules of Civil Procedure, that you, The Franklin Life Insurance Company, make the admissions herein specified within 15 days after the service of this request upon you. You are requested to make the said admissions only for the purposes of this action and subject to all pertinent objections to admissibility which may be interposed at the trial.

Accordingly, you are hereby requested to admit that:

(a) A Receipt, in words and figures contained in the attached printed form with the typewritten words and figures therein inserted, was given by your soliciting agent, Jack O'Neil, to Warren William Lloyd, the insured under policy No. 1127042 mentioned in the Complaint herein, on December 6, 1952:

No. 665143

This receipt must not be detached unless settlement toward first premium is collected at time of application, and shall operate as a Binding Receipt under conditions stated in Paragraph "First" only.

Receipt

Received from Warren William Lloyd, \$12.57 (note \$12.57) on account of the first monthly premium on proposed insurance on the life of Warren William Lloyd, for which an application bearing a corresponding number is this day made to The Franklin Life Insurance Company.

First: It is agreed that (1) if the entire first premium stipulated in the policy issued hereon is paid to an authorized agent of the Company at the time of making this application and (2) if the Company shall be satisfied after investigation and medical examination, if a medical examination is required, that the proposed insured was, under the

Company's rules and standards, an acceptable risk for the amount of insurance (not in excess of the Company's limit of retention) and upon the plan and at the rate of premium applied for on the date hereof or on the date of the medical examination, if a medical examination was required, whichever is the later, the insurance shall be effective in accordance with the provisions of the policy applied for from the date of this application or the date of the medical examination, if a medical examination was required, whichever is the later.

Second: If the entire first premium is not paid or if a policy is issued differing in plan or amount or premium or benefits from that applied for, no insurance shall be considered in effect under this application unless and until the first premium is paid and the policy manually delivered to and accepted by the applicant during the continued lifetime and good health of the proposed insured.

Dated December 6, 1952.

Signed:

JACK O'NEIL,
Agent.

This receipt shall be void if altered or modified or if any check or draft tendered in payment of the first premium is not paid when presented for payment.

This receipt to be detached by agent Only when payment is received at time of making application.

(b) That said Receipt was attached to Application No. 665143, being the same Application, a photostat copy of which is attached to your Answer heretofore filed herein;

(c) That said Receipt was given to the named applicant, Warren William Lloyd, pursuant to authority delegated by you to said agent to give such Receipt, and that said Receipt is a true, genuine and correct copy of the Receipt actually given by your said agent so authorized to give it;

(d) That said Receipt was given by your said agent upon a form prepared by you.

(e) Pursuant to your regular underwriting practices and standards you approved the application for the issuance of the policy of life insurance on the plan and for the class of risk and amount of insurance applied for.

(f) That the commencement of the suicide period set forth in the third defense of your Answer on page 2 thereof between lines 10 and 12, inclusive, commenced coincident with the attaching of the risk.

(g) That in the event of the death of the said insured from natural causes on or after December 6, 1952, you would have become liable to pay the beneficiary the benefits provided in said policy;

(h) That the attached copy of letter dated January 26, 1955, addressed to Charles W. Ricketts, Los Gatos, California, and signed Frieda Visser, Secretary Claims Committee, of your company, is

a true copy of the original sent to said Ricketts on said date.

Dated: October 14, 1955.

/s/ NEIL CUNNINGHAM,

/s/ C. W. RICKETTS,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

(Copy)

The Franklin Life Insurance Company

Home Office: Springfield, Illinois

January 26, 1955

Mr. Charles W. Ricketts,

Attorney at Law,

131 West Main Street,

Post Office Box 273,

Los Gatos, California.

Re: Policy No. 1127042,

Warren William Lloyd, Deceased.

Dear Mr. Ricketts:

We have for acknowledgment your letter of January 18.

If you will refer to the photostatic copy of the application, which is attached to this policy, you

will note in box number 25 that our Company was requested to date the policy January 1, 1953. If this request had not been made, the policy would have been issued with an effective dating of December 11, 1952, with premium payments commencing on that date. In that event, we would have considered that the suicide period had expired on December 11, 1954. We hold that the terms of the binding receipt were modified by the insured's own act in requesting a policy date in advance of either the application date or the date of the medical examination, and that in view of the requested policy date, the suicide period had not expired at the time of death, as our risk would not have commenced until January 1, 1953, and any first premium paid by the insured would have been for the premium due January 1, 1953.

We can admit no liability on the policy other than the return of the eight quarterly premiums paid totaling \$288.32 and our check for this amount is enclosed, payable to the order of Leeta A. Lloyd, beneficiary, and through you, her attorney, we make demand for the surrender of this policy.

Very truly yours,

/s/ FRIEDA VISSER,

Secretary Claims Committee.

[Endorsed]: Filed October 14, 1955.

[Title of District Court and Cause.]

REPLY TO REQUEST FOR ADMISSION

State of Illinois,
County of Sangamon—ss.

The Franklin Life Insurance Company, defendant in the above-entitled action, makes the following statement in response to the request for admission of facts and of genuineness of documents served upon it by plaintiff on October 19, 1955:

1. It denies the truth of the matters set forth in paragraphs a, c, d, and g.

2. It denies the truth of the matters set forth in paragraph b. It states that a receipt containing printed provisions identical to the provisions of the receipt attached to the request, with the exception of the number appearing thereon, was attached to application number 665143 and bore the same number, but it denies that such receipt was detached and given to the applicant Lloyd.

3. It denies the truth of the matters set forth in paragraph f and states that the period under the suicide clause started January 5, 1953.

THE FRANKLIN LIFE
INSURANCE COMPANY,

By /s/ R. A. FREDERICK,
Administrative Vice Pres.

Subscribed and sworn to before me this 2nd day of November, 1955.

[Seal] /s/ ANTONETTE LUDEK,
Notary Public in and for the County of Sangamon,
State of Illinois.

My commission expires May 17, 1959.

Receipt of copy acknowledged.

[Endorsed]: Filed November 8, 1955.

[Title of District Court and Cause.]

REQUEST TO ADMIT

Please take notice that defendant requests plaintiff within fifteen days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the document attached to defendant's answer as Exhibit A, which is a copy of defendant's policy No. 1127042 and of the application therefor by the insured Warren William Lloyd, is a true copy of said policy and application.

2. That the document attached to this request and marked Exhibit B, which is a copy of a letter sent by defendant to plaintiff with respect to payment of a premium under the policy, is a true copy of said letter.

3. That the two signatures appearing on parts one and two of the application referred to in paragraph 1, *supra*, which purport to be the signature in each instance of the proposed insured Warren William Lloyd, are in fact his signatures.

4. That the insured Warren William Lloyd requested, at the time his application for insurance was completed, that his policy (subsequently defendant's policy number 1127042) be dated January 1, 1953.

5. That defendant's policy number 1127042 was delivered to the insured Warren William Lloyd sometime after January 5, 1953.

6. That the insured Warren William Lloyd died by self-destruction December 21, 1954.

7. That total premiums of \$288.32 were paid under defendant's policy number 1127042, consisting of eight quarterly premiums of \$36.04 each.

November 15, 1955.

McCUTCHEON, THOMAS, MATTHEW, GRIFFITHS & GREENE,

Attorneys for Defendant.

EXHIBIT B

August 19, 1954.

Mrs. Leeta A. Lloyd,
1464 Maxine Street,
San Jose, California.

1127042—Warren W. Lloyd.

Dear Mrs. Lloyd:

We have received your check for \$36.04 intended as payment of the quarterly premium due July 1, 1954, under your husband's policy. According to our records this premium was credited the early part of July, placing the contract in good standing to October 1, 1954. Under the circumstances, we are returning your check dated July 19th which is not required.

Sincerely,

/s/ (MRS.) AGNES J. CAUDLE,
Premium Accounting Dept.

AJC:bb

Enclosure

CC: Mr. Arthur B. Crebassa,
Mr. George A. Landis.

[Endorsed]: Filed November 16, 1955.

[Title of District Court and Cause.]

REPLY TO REQUEST TO ADMIT

To: McCutchen, Thomas, Matthew, Griffiths &
Greene, Morris M. Doyle, Bernard Petrie,
Esquires:

Plaintiff Leeta A. Lloyd makes the following statements in response to defendant's Request to Admit, dated November 15, 1955.

1. Admits as to defendant's Exhibit A, attached to defendant's answer, that the copy of policy number 1127042 as set forth in said Exhibit A is a true copy of said policy. Denies that the application set forth in that Exhibit A is the full application form as signed by Warren William Lloyd; and alleges that to the application when signed by the said Warren William Lloyd there was attached a form of receipt prepared by defendant and that that form of receipt was the same form of receipt described in Request for Admissions of Fact Pursuant to Rule 36, Federal Rules of Civil Procedure, served on defendant on October 19, 1955.

2. Admits that the document marked Exhibit B attached to defendant's Request to Admit, dated November 15, 1955, is a true copy of a letter sent by defendant to plaintiff.

3. Admits that the two signatures appearing on Part One and Two of the application referred to, which purports to be the signature in each instance

of the proposed insured Warren William Lloyd are in fact his signatures.

4. Denies that Warren William Lloyd requested that his policy be dated January 1, 1953.

5. Admits that defendant's policy number 1127042 was delivered to the insured Warren William Lloyd sometime after January 5, 1953.

6. Admits that the insured Warren William Lloyd died by self-destruction, December 21, 1954.

7. Denies all statements in number 7 of defendant's said Request to Admit.

November 27, 1955.

/s/ NEIL CUNNINGHAM,

/s/ C. W. RICKETTS.

Receipt of copy acknowledged.

[Endorsed]: Filed November 30, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
UNDER RULE 56(B) AND (C)

The defendant hereby moves the Court to enter summary judgment for it, in accordance with the provisions of Rule 56(b) and (c) of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that

defendant is entitled to judgment as a matter of law.

This motion is based upon the pleadings, defendant's request to admit served November 16, 1955, and the reply thereto served November 29, 1955, and the affidavit of R. A. Frederick attached hereto.

McCUTCHEON, THOMAS, MATTHEW, GRIF-
FITHS & GREENE,

Attorneys for Defendant.

Notice of Motion

To: Neil Cunningham, Esq., 1508 Hobart Building,
582 Market Street, San Francisco 4, California,
and C. W. Ricketts, Esq., 131 West Main
Street, P.O. Box 273, Los Gatos, California,
Attorneys for Plaintiff.

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court in the Master Calendar Department, United States Court House, Post Office Building, Seventh and Mission Streets, City of San Francisco, on the 16th day of January, 1956, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

McCUTCHEON, THOMAS, MATTHEW, GRIF-
FITHS & GREENE,

Attorneys for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT OF R. A. FREDERICK IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

State of Illinois,
County of Sangamon—ss.

R. A. Frederick, being duly sworn, states:

I am fifty-four years old and live at No. 3 Wildwood Road, Springfield, Illinois.

I am the Administrative Vice President of The Franklin Life Insurance Company (hereinafter called the Company), defendant in the above-entitled action. I have held that position since October 20, 1949. I have been employed by defendant since November 1, 1923. In my present capacity I supervise the processing of applications for insurance and the issuance of policies in accordance therewith. The various steps in the processing of applications and the issuance of policies are well known to me. The records of the Company are held by a custodian under my supervision.

I have caused a true copy of defendant's insurance policy No. 1127042 together with the insured's application therefor to be made and attached hereto as Exhibit A.

The following is a description of the operation by which applications are processed, policies are issued and the Company's records are kept. The ap-

plication is received by Harriette Good at the mail desk in the Company's Entry Division, where work papers are prepared and placed with the application on a file back. The file is then sent to the Underwriting Department for approval. If the application is approved, it is sent to the New Business Department. At this point the policy is typed and a so-called "permanent data" record is made so that duplicate copies of the policy can be prepared if necessary. The original application is attached to the "permanent data" record. The policy with accompanying material is then sent to the Records Section. At this point a photostatic copy is made of the application and attached to the policy. The policy is mailed from the Records Section and records are printed there. The "permanent data" record with application attached is sent to the vault. The supervisor of the vault and custodian of the records there is Mr. George Cunningham.

When an application is received by Harriette Good at the mail desk of the Entry Division with its receipt still attached, that receipt is detached in the Entry Division and placed on the file with the application.

Exhibit A attached hereto was made from the "permanent data" record and from the insured's application. A true copy of the policy was made from the data and a photostatic copy of the application was made from the original application. The original application will be presented upon the hear-

ing of the Company's motion for summary judgment.

The application for policy No. 1127042, the policy involved in this action, was received in the Company's home office December 11, 1952. The policy was actually executed, that is, typed and signed, in the Company's home office January 5, 1953. That date of execution appears in the "permanent data" record. The policy was made effective as of January 1, 1953, in accordance with the special request of the insured contained in box number 25 of Part 1 of his application. Pursuant to that request the first policy year commenced January 1, 1953. The policy was mailed from the home office January 6, 1953, to the Company's agent for delivery.

When the application was received at the Entry Division, there was still attached to it the receipt bearing the number identical to that on the application. In accordance with routine practice that receipt was detached in the Entry Division and placed just in back of the application on the file back. When this suit was commenced, the receipt was removed from the file back and sent to Mr. Frederick H. Stone, an associate counsel for the Company. Mr. Stone now has custody of that receipt. I have caused a copy of that receipt to be made and attached hereto as Exhibit B. I have been advised by counsel that the Company is conceding, for the purposes of this motion only, that the receipt attached to the application or a receipt substantially similar in form was given to the insured. Therefore, it is not

now contemplated that the receipt will be presented on the hearing of the Company's motion for summary judgment. Mr. Stone is retaining the receipt in his possession.

/s/ R. A. FREDERICK.

Subscribed and sworn to before me this 15th day of December, A.D. 1955.

[Seal] /s/ ANTONETTE LUDEK,
Notary Public in and for the State of Illinois,
County of Sangamon.

My commission expires May 17, 1959.

EXHIBIT B

No. 665143

This receipt must not be detached unless settlement toward first premium is collected at time of application, and shall operate as a Binding Receipt under conditions stated in Paragraph "First" only.

Receipt

Received from \$.
in cash \$.and/or note \$.on account
of the first.....premium on proposed insurance on the life of.....
for which an application bearing a corresponding number is this day made to The Franklin Life Insurance Company.

First. It is agreed that (1) if the entire first premium stipulated in the policy issued hereon is paid to an authorized agent of the Company at the time of making this application and (2) if the Company shall be satisfied after investigation and medical examination, if a medical examination is required, that the proposed insured was, under the Company's rules and standards, an acceptable risk for the amount of insurance (not in excess of the Company's limit of retention) and upon the plan and at the rate of premium applied for on the date hereof or on the date of the medical examination, if a medical examination was required, whichever is the later, the insurance shall be effective in accordance with the provisions of the policy applied for from the date of this application or the date of the medical examination, if a medical examination was required, whichever is the later.

Second. If the entire first premium is not paid or if a policy is issued differing in plan or amount or premium or benefits from that applied for, no insurance shall be considered in effect under this application unless and until the first premium is paid and the policy manually delivered to and accepted by the applicant during the continued lifetime and good health of the proposed insured.

Dated, 19... Signed Agent

This receipt shall be void if altered or modified or if any check or draft tendered in payment of the first premium is not paid when presented for payment.

This receipt to be detached by agent Only when payment is received at time of making application.

Affidavit of service attached.

[Endorsed]: Filed January 5, 1956.

MEMORANDUM IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

“Defendant concedes for the purposes of this motion only that a receipt on a form prepared by defendant was given to the insured.”

Dated December 30, 1955.

[Endorsed]: Filed January 5, 1956.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
UNDER RULE 56

Plaintiff moves the Court to enter summary judgment for plaintiff in accordance with Rule 56 of the Federal Rules of Civil Procedure on the ground that there was no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

This motion is based upon the pleadings and upon all of the papers in the file in this case including the deposition of Jack O’Neil.

Dated at Los Gatos, California, January 24, 1956.

/s/ C. W. RICKETTS,

Attorney for Plaintiff.

Notice of Motion

To: McCutchen, Thomas, Matthew, Griffiths & Greene, Morris M. Doyle, Bernard Petrie, 1500 Balfour Building, 351 California Street, San Francisco 4, California. Telephone: DOuglas 2-3131. Attorneys for Defendant.

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court in the Master Calendar Department, United States Court House, Post Office Building, Seventh and Mission Streets, City of San Francisco, on the 7th day of February, 1956, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ C. W. RICKETTS,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed January 28, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF JACK O'NEIL IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

State of California,
County of Santa Clara—ss.

Jack O'Neil, being duly sworn, states:

I am 53 years old and live at 4712 Alum Rock Avenue, San Jose, California. I am an insurance

agent with offices at 1612 East Santa Clara Street, San Jose, California.

I have operated as a life insurance agent for The Franklin Life Insurance Company (hereinafter called the Company), defendant in the above-entitled action, since 1952. I knew Warren William Lloyd and on December 6, 1952, completed for him an application for insurance with the Company. That application, copy of which is attached hereto as Exhibit A, was numbered 665143. Mr. Lloyd signed the application in my presence.

At the time of his application, Mr. Lloyd gave to me a note for \$12.57 to cover a full monthly premium on the plan applied for. I delivered the application to Mr. Crebassa, a general agent of the Company in San Jose, but I kept Mr. Lloyd's note in my possession.

In January, 1953, I received from the Company policy number 1127042 issued upon the above application and delivered it to Mr. Lloyd. At that time Mr. Lloyd decided to pay premiums quarterly instead of monthly as he originally requested. Therefore, he gave to me his check for \$36.04 to cover the first quarterly premium for the quarter January 1 to March 31, 1953. At the same time I either returned the note to Mr. Lloyd or destroyed it. In all probability I returned the note to him. It has been my practice to return to insured persons notes or checks initially deposited with me and superseded by a subsequent payment as in Mr. Lloyd's case. I can state categorically that Mr. Lloyd never made any payment to me on the note.

At no time did Mr. Lloyd make a request for short term or temporary insurance pending the issuance of his policy, which was to be effective January 1, 1953. Mr. Lloyd gave the note to me to cover the first monthly premium on the policy to be issued.

The Company's instructions regarding short term insurance appear at pages 35 and 36 of the Company's Rate Book, published in January, 1948. Copies of those pages are attached hereto as Exhibits B and C, respectively. Under those instructions, if short term insurance is requested, the procedure outlined must be followed. A request for the short term insurance must be made in the application. The premium for the short term insurance must accompany the application. The first regular premium must be paid before the end of the short term period.

Since Mr. Lloyd did not request any short term insurance, none of the above steps were followed in this case.

/s/ JACK O'NEIL.

Subscribed and sworn to before me this 17th day of February, 1956.

[Seal] /s/ ETHEL L. GRACE,
Notary Public in and for the County of Santa
Clara, State of California.

My commission expires March 15, 1956.

EXHIBIT B

Waiver disability is issued to male lives at ages 15 to 55, inclusive, and to female lives at ages 15 to 50, inclusive. Disability extra is not payable after age 60 for male lives and 55 for female lives.

Double Indemnity Insurance

This book shows the extra premium required for double indemnity insurance. This benefit is issued at ages 15 to 55, inclusive. If the benefit is attached to a policy the premium for such benefit is not payable after the insured attains age 60.

Sub-Standard Insurance Values

This rate book contains the extra premium required for policies issued on a sub-standard basis. The non-forfeiture values for sub-standard policies are the same as those for standard policies, except that any sub-standard policy issued will not provide extended insurance. The automatic non-forfeiture option will be paid-up insurance.

Short Term Insurance

An applicant may desire that the annual premiums on his policy be made payable at a certain time of the year; for instance, a cotton planter may prefer to have his premiums become due late in the fall, when his cotton has been marketed. Under such circumstances Short Term Insurance may be granted by endorsement on the regular policy. Re-

quest for same should be stated in the application over the signature of applicant.

Short Term Insurance will not be granted for more than six months. Any portion of one month will be considered as an additional month; for example, where term desired is four months and ten days, premium for five months will be charged.

On policies issued with short term the premium for such short term must accompany the application.

EXHIBIT C

The first regular premium must be paid before the end of the short term period. No grace period is permitted for payment of this premium. No commissions are payable on short term premiums.

Special attention must be paid to the question of insurance age. Upon expiration of the Short Term Insurance, which is the beginning of the regular insurance, the insurance age may be one year higher than the age on which the Short Term premium at date of issue is based. In such a case the regular premium for the higher age must be collected.

The rates per \$1,000 for one month's Short Term Insurance appear on the "Miscellaneous Premium Rates" pages. For two months, multiply by 2; for three months, by 3; and so on.

On Juvenile Policies with Payor Benefits add 1/12 of the extra for Payor Insurance.

On Substandard Policies with a table rating multiply the standard premium by the following factors:

Table	Factor
A	1.25
AA	1.375
B	1.50
C	1.75
D	2.00
E	2.25
F	2.50

On Substandard Policies with a Flat Extra Rating add 1/12 of the extra for each month.

[Endorsed]: Filed February 20, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE E. HATMAKER IN
OPPOSITION TO PLAINTIFF'S CROSS-
MOTION FOR SUMMARY JUDGMENT

State of Illinois,
County of Sangamon—ss.

George E. Hatmaker, being duly sworn, states:

I am forty-five years old and live at 1317 East Lake Shore Drive, Springfield, Illinois.

MORTGAGE REDEMPTION							
1127012		M. E. Period	P. 782				
		Yr.					
Annual	Quar. Ann.	Qtrly.	Monthly	SS or AA	Sht. Term Irreg.		
57.15	29.72	15.08	5.04				
4.88	2.59	1.26	.41				
DB 4.50	2.34	1.20	.42				
51.13	24.10	11.54	5.87				
70.00	35.40	18.30	6.20				
31.11	15.95	7.94	2.67				

AMOUNT MORTGAGE REDEMPTION INSURANCE								
Amount	Yr.	Amount	Yr.	Amount	Yr.	Amount	Yr.	Amount
5,000	6	11	6,500	10	4,500	11		
7,000	9	10	6,200	17	4,200	22		
9,400	8	10	5,800	10	3,800	24		
9,100	8	24	5,400	10	3,400	24		
8,200	10	11	5,000	20	3,000	20		

Endorsed: Filed February 21, 1956.

[Title of District Court and Cause.]

ORDER

This cause came on to be heard on motion of the defendant for summary judgment pursuant to Rule 56, F.R. Civ. P., and on the plaintiff's counter-motion for summary judgment under Rule 56.

The Court has considered the pleadings, admissions, depositions and affidavits, together with all other documents on file. Plaintiff has conceded in open court that the insured requested the dating of the policy as it appears on the application and the insurance policy. This eliminates any issue as to a material fact. The Court has heard oral argument and considered the memoranda filed by the parties hereto. There being no genuine issue as to any material fact, and the defendant being entitled to judgment as a matter of law, it is the order of the Court that defendant's motion be, and the same hereby is, granted, and plaintiff's motion be, and the same hereby is, denied. It is further ordered that the defendant recover its costs.

Dated: February 21, 1956.

/s/ EDWARD P. MURPHY,

United States District Judge.

[Endorsed]: Filed February 21, 1956.

exhibits and other papers in the file of this case and which have been used or referred to in connection with the motion and cross-motion for summary judgment or otherwise.

Dated at Los Gatos, California, March 7, 1956.

NEIL CUNNINGHAM, and
C. W. RICKETTS,

By /s/ C. W. RICKETTS,
Attorneys for Plaintiff.

Memorandum of Points and Authorities in Support
of Motion to Vacate Summary Judgment

Defendant's motion for summary judgment was improperly and erroneously granted because material fact issues were unresolved at the time of granting the said motion for summary judgment. Plaintiff refers to the following material fact issues unresolved in this case, to wit:

1. Was a copy of the application given to Warren William Lloyd by defendant's agent, Jack O'Neil, at the time that the application was signed? This is a material issue because defendant's agent Jack O'Neil (hereinafter O'Neil) acknowledged in the application, photostatic copy of which is attached to the answer of defendant in this case, that a promissory note was given by Warren William Lloyd, the applicant, to O'Neil on December 6, 1952, the date of the application. This is material because Section 10115 of the California Insurance

Code makes life insurance coverage commence on December 6, 1952, the date the application was signed by the applicant," when a payment is made equal to the full first premium at the time an application for life insurance * * * is signed by the applicant and * * * the applicant received at that time a receipt for said payment on a form prepared by the insurer * * *"

2. In his deposition, which must be taken as true for purposes of ruling on summary judgment, O'Neil said that at the time the application was signed a cover note coupon was attached to the application whereby insurance coverage would commence December 11, 1952. See deposition of O'Neil.

3. The policy itself provides that "this policy and the application therefor, a copy of which is hereto attached and made a part hereof, constitute the entire contract between the parties." The policy also provides "this insurance is granted in consideration of the application herefor and of the payment in advance of the premium as herein provided." Refer to *Meyer vs. Johnson*, 7 Cal. App. 2d 604, 609, where the court holds that "as a matter of fact, as well as of law, it is apparent, therefore, that the whole application was necessary to constitute the contract." At the time of argument for motion of summary judgment, defendant introduced application with the coupon cover note attached showing that insurance coverage would commence on December 11, 1952, the date of the medical examination. The failure of O'Neil to detach

and deliver to the applicant the coupon cover note at the time of receiving the promissory note given by applicant to O'Neil, is not a failure that can be attributed to the applicant or to plaintiff, because the applicant had the right to receive the coupon cover note at that time. See *Ransom vs. The Penn Mutual Life Insurance Company*, 43 Cal. 2d 420; 274 P. 2d 633, and cases there cited.

4. Plaintiff cannot be deprived of the right to submit to a jury the question as to whether an identical cover note from another application or the same application was given by O'Neil to the applicant at the time of signing the application. On page 9 of his deposition, O'Neil stated that it was his usual procedure to give a receipt and that he must have given a receipt in this case and that his usual procedure is to use the form of receipt attached to the application. It will be presumed that the usual business procedure was followed. See California Code of Civil Procedure, Section 1963, subdivisions 4, 19, 20, 21 and 28. These presumptions are fact presumptions which would furnish evidence to be submitted to a jury.

5. It is clearly the law that applicant was entitled to the coupon cover note receipt when he gave his promissory note at the time he signed the application. There is no question but that he gave the note at that time and that it was equal to a full month's premium. See deposition of O'Neil, page 11. A jury should be premitted to pass upon the question as to whether the coupon cover note

receipt attached to the application or another identical receipt was given by O'Neil to the applicant at the time the application was signed.

Dated at Los Gatos, California, March 7, 1956.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 8, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above-named plaintiff Appeals to the United States Court of Appeals for the Ninth Circuit from the summary judgment made and entered herein on the 27th day of February, 1956, ordering, adjudging and decreeing that defendant "is entitled to judgment as a matter of law, that the action be dismissed on the merits, and that defendant recover its costs" and from the whole of said judgment.

Dated this 26th day of March, 1956.

/s/ NEIL CUNNINGHAM,

/s/ C. W. RICKETTS,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed March 27, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On the application of plaintiff ex parte, the Court being fully advised,

It Is Ordered that the time for filing the Record on Appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by plaintiff by Notice of Appeal, filed March 27, 1956, is extended to May 27, 1956, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: April 25th, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed April 25, 1956.

[Title of District Court and Cause.]

ORDER

I have considered the motion to vacate judgment in the above-entitled cause. In my opinion there is no merit in the motion. Accordingly, it is hereby denied.

Dated: April 25, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed April 25, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above-named plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from the Summary Judgment made and entered herein on the 27th day of February, 1956, ordering, adjudging and decreeing that defendant "is entitled to judgment as a matter of law, that the action be dismissed on the merits, and that defendant recover its costs" and from the whole of said judgment, and from the Order of the above-entitled Court made and entered herein on the 25th day of April, 1956, denying plaintiff's motion to vacate said Summary Judgment.

Dated: May 5, 1956.

/s/ NEIL CUNNINGHAM,

/s/ CHAS. W. RICKETTS,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 7, 1956.

[Title of District Court and Cause.]

DEPOSITION OF JACK O'NEIL

Be It Remembered: That, pursuant to written stipulation of taking deposition attached hereto, and

on Tuesday, the 25th day of October, 1955, commencing at the hour of 10:30 o'clock a.m. of said day, before Victor C. Osterman, a Notary Public, personally appeared Jack O'Neil, produced as a witness on behalf of Plaintiff herein, at the office of Moore & Minor, 45 North First Street, San Jose, California, and being by me first duly sworn, was examined as a witness in said cause.

C. W. Ricketts, Esq., and Neil Cunningham, Esq., are present on behalf of Plaintiff herein.

Bernard Petrie, Esq., representing McCutchen, Thomas, Matthew, Griffiths & Greene, Esq., is present on behalf of Defendant herein. [2*]

It is stipulated that said deposition may be taken before Victor C. Osterman, a Notary Public in and for the County of Santa Clara, State of California.

It is further stipulated that said deposition is taken under the Federal Rules of Civil Procedure.

It is further stipulated that in the event the witness refuses to answer any question, that the Notary has instructed him to answer, and the witness still refuses to answer on the advice of Counsel.

It is further stipulated that said deposition may be taken down in stenotype by Victor C. Osterman, a competent stenographic reporter, and not interested in any way in the case or any of the parties involved. [3]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

JACK O'NEIL

being first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth testified as follows:

Direct Examination

By Mr. Ricketts:

Q. Your name? A. Jack O'Neil.

Q. Where do you live, Mr. O'Neil?

A. 4712 Alum Rock Avenue.

Q. In San Jose? A. Right.

Q. And where is your office?

A. 1612 East Santa Clara Street.

Q. In San Jose? A. San Jose.

Q. What is your occupation, business or profession, Mr. O'Neil? A. Insurance agent.

Q. How long have you been in that occupation?

A. Seven years.

Q. How many years? A. Seven.

Q. Seven? A. Seven years.

Mr. Ricketts: May I see that Answer there?

Q. (By Mr. Ricketts): Mr. O'Neil, I will call your attention to the Answer that has been filed by the Defendant, the Franklin Life Insurance Company, a corporation, in a certain action now pending in the United States District Court, Northern District of California, Southern Division, wherein Leeta A. Lloyd is plaintiff, and which is Action No. 34715. [4] I will call your attention—L will call your attention to the photostatic copy, Mr. O'Neil, of a policy of life insurance attached to

(Deposition of Jack O'Neil.)

that Answer, purporting to be a policy of life insurance issued by the Franklin Life Insurance Company on the life of Warren William Lloyd, and which policy is dated January 5, 1953. I will call your attention, Mr. O'Neil, particularly to the photostatic copy of application attached to that Answer. Mr. O'Neil, this application was filled out by you? A. Right.

Q. This is your signature? A. Yes.

Q. This is the signature of Warren William Lloyd, the applicant? A. Yes.

Q. When that application was signed by Warren William Lloyd, was there a receipt attached to that application bearing the same number as the application? A. Right.

Q. And did that receipt read as follows—I am now reading from a receipt:

“This receipt must not be detached unless settlement toward first premium is collected at time of application and shall operate as a binding receipt under conditions stated in Paragraph ‘First’ only.”

“Receipt.”

Then, Mr. O'Neil, I will call your attention to the fact that on the right-hand margin of this receipt we are talking about [5] there appears, or there appear the following words:

“This receipt to be detached by agent only when payment is received at time of making application.”

Mr. O'Neil, I will continue reading from the receipt.

(Deposition of Jack O'Neil.)

Mr. O'Neil, I will leave blank the parts of the receipt which are not printed:

“Received from \$...... in cash, \$...... and/or note, \$...... on account of the first premium on proposed insurance on the life of for which an application bearing a corresponding number is this day made to The Franklin Life Insurance Company.”

Mr. Petrie: Mr. Ricketts, I don't like to interrupt, but do you intend to read the entire receipt?

Mr. Ricketts: I do.

Mr. Petrie: I understand under this stipulation that we are reserving all objections as to admissibility until trial; however, I want to make it perfectly plain lest I waive my objection under the best evidence rule, under Rule 32(c) of the Federal Rules of Civil Procedure, that we would object to this line of questioning on that ground.

Mr. Ricketts: I am sure that the Court Reporter will note your objection, Mr. Petrie.

Q. (By Mr. Rickett): “First”—continuing from the receipt—“First. It is agreed that (1) if the entire first [6] premium stipulated in the policy issued hereon is paid to an authorized agent of the Company at the time of making this application and (2) if the Company shall be satisfied after investigation and medical examination, if a medical examination is required, that the proposed insured was, under the Company's rules and standards, an acceptable risk for the amount of insurance (not in

(Deposition of Jack O'Neil.)

Q. Is it not your usual procedure to use the form of receipt attached to the application?

A. It is.

Q. At the time that the application was signed by Warren William Lloyd—

Mr. Cunningham: And by yourself.

Q. (By Mr. Ricketts): —and by yourself, did you have with you a supply of other application forms? A. I did.

Q. May I finish the question, Mr. O'Neil?

A. Excuse me.

Q. I will start it over again.

At the time, Mr. O'Neil, that you and Warren William Lloyd signed the application, the photo-static copy of which I [9] have shown to you, did you have with you a supply of identical application forms and receipt forms of the kind that I have shown to you, being the application form attached to the Answer, and the receipt form which I have just finished reading to you? A. Yes.

Q. You had a supply of those at that time?

A. Yes.

Q. And they read identically, did they. Mr. O'Neil, with the application and receipt I have read to you this morning? A. Yes.

Mr. Ricketts: This is off the record here.

(Discussion off record.)

Q. (By Mr. Ricketts): Mr. O'Neil, the last question I asked of you, I said that I had read the application form. I mean the application form,

(Deposition of Jack O'Neil.)

copy, photostatic copy of which is attached to the Answer, which I have heretofore shown you here this morning in the course of this deposition. You understand that is the application form that I am referring to? A. Right.

Q. In asking you whether you had a supply of such forms on hand at the time that you and Mr. Warren William Lloyd signed this application?

A. Yes.

Q. And attached to those applications was a receipt form, is that correct? A. That's right.

Q. I will further call your attention, Mr. O'Neil, to the photostatic copy of the application which the Defendant has attached to its Answer in this case, and you will note on the [10] application form, this application, photostatic copy attached to the Answer, there has been delivered to the agent the sum of—is that \$12.57, or is that 59 cents?

A. Can't say.

Q. It is one of the two, isn't it, 12.57 or 12.59?

A. That's right.

Q. How was that figure arrived at; what does that 12.57 or 12.59 represent, Mr. O'Neil?

A. It represents a monthly premium, a monthly premium on the proposed policy.

Q. Was that \$12.57 then, Mr. O'Neil, at least equal to the full first premium on a monthly payment basis on the plan and class of risk and amount of insurance that Warren William Lloyd then applied for?

(Deposition of Jack O'Neil.)

A. As it turned out, I think it was more than the premium. I miscalculated.

Q. It was at least equal to it? A. Right.

Mr. Ricketts: You have any more questions?

Q. (By Mr. Ricketts): At the time that Warren William Lloyd signed this application, how long had you been representing Franklin Life Insurance Company, the Defendant in this case?

A. I would say approximately eight months, eight to ten months. I do not remember the exact date.

Q. Several months, you will testify?

A. Yes.

Q. And had you, prior to that time—that is to say, prior to the time of taking the application of Warren William Lloyd, [11] taken other applications for life insurance for the Franklin Life Insurance Company? A. Yes.

Q. And about how many would you say?

A. Oh, I have no idea.

Q. Twenty-five?

A. No, closer to—ten or fifteen.

Q. Ten or fifteen. And on those prior times, did you use this same form of application and receipt?

A. That's right.

Q. And you filled out the application and the receipt in each instance? A. Yes.

Q. And they were the identical ones that we have been talking about this morning?

A. Yes.

(Deposition of Jack O'Neil.)

Mr. Ricketts: That's all, Mr. O'Neil. Thank you.

Mr. Petrie: I have a few questions.

Cross-Examination

By Mr. Petrie:

Q. How was the payment of \$12.57 made, Mr. O'Neil?

A. Mr. Lloyd's note. He gave me a note for it.

Q. What did you do with that note?

A. I imagine I gave it back to him. I don't remember.

Q. After you received the note from Mr. Lloyd, did you keep that note in your possession or did you forward it with the application to the General Agent?

A. I kept it in my possession.

Q. Did you fill out this application in your office or [12] elsewhere?

A. No, in Mr. Lloyd's home.

Q. Were you using any form of receipt generally in your business at the time you filled out this application?

A. Yes, I have a regular receipt form in duplicate that I use for all business, all business transactions.

Q. Is it possible that you gave Mr. Lloyd a receipt from that general book, upon this occasion?

A. Could have been. I don't remember that instance.

Q. You have no recollection of just what kind of receipt you did give to Lloyd, is that right?

A. That's right.

(Deposition of Jack O'Neil.)

Q. How was the policy delivered to Lloyd?

A. I delivered it.

Q. At the time that you delivered the policy to Lloyd, did you still have his note in your possession?

A. I don't remember; probably I had it with me.

Q. At the time you delivered the policy to him, was any payment of premium made to you?

A. At that time, yes, he gave me a check.

Q. What did you do with that check?

A. I turned it over to the General Agent.

Q. Was that the first premium payment that you forwarded to the General Agent? A. Yes.

Mr. Petrie: I have no further questions.

Mr. Ricketts: No further questions, Mr. O'Neil.

[Endorsed]: Filed January 9, 1956. [13]

In the United States District Court for the Northern District of California, Southern Division

No. 34715

LEETA LLOYD,

Plaintiff,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Before: Hon. Edward P. Murphy, Judge.

REPORTER'S TRANSCRIPT

Partial Opening Statement for Plaintiff

Tuesday, February 21, 1956

* * *

The Court: Now, counsel, I want to interrupt you. You have been taking a lot of time. You have prepared a very elaborate memorandum here. I am perfectly capable of reading the cases that are cited in support of your argument; but I am going to get back now to what I think is essential in this case, and that is whether or not you, as plaintiff, concede that Lloyd requested that the policy be dated January 1, 1953, regardless of who wrote it on the application. Do you concede that?

Mr. Ricketts: I concede that it was there, your Honor. I can't do anything else. The photostat shows it.

The Court: All right. You don't need to read all these cases to me, because I haven't the time to listen.

Mr. Ricketts: O.K.

The Court: I will read them myself in passing upon these motions, but that seems to me to be essential in this case as to whether you concede that Lloyd requested the policy be dated January 1, 1953, regardless of who wrote it on the application. You say you do concede that?

Mr. Ricketts: Yes, your Honor; we can't avoid that.

* * *

[Endorsed]: Filed April 6, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for appellant and appellee:

Excerpt from docket entries.

Complaint.

Answer of Defendant with photostat copy of policy of insurance attached.

Request of Plaintiff for Admissions by Defendant.

Reply of Defendant to Request for Admissions.

Request of Defendant for Admissions by Plaintiff.

Reply of Plaintiff to Request for Admissions.

Motion of Defendant for Summary Judgment with (a) Affidavit of R. A. Frederick, and (b) Copy of Policy of Insurance attached.

Request of Plaintiff for Admissions by Defendant and Demand for Production of Agent's Confidential Report.

Deposition of Jack O'Neil.

Reply of Defendant to Request for Admissions.

Motion of Plaintiff for Summary Judgment.

Affidavit of George E. Hatmaker with photostat copy of premium card.

Affidavit of Jack O'Neil with photostat copies of Application for Insurance and Exhibits B and C.

Order Granting Motion of Defendant for Summary Judgment and Denying Motion of Plaintiff. Judgment.

Notice and Motion by Plaintiff to Vacate Judgment, with memorandum of Points and Authorities Attached.

Copy of Notice by Office of Clerk of Entry of Judgment.

Notice of Appeal by Plaintiff, filed March 27, 1956.

Order Extending Time to Docket Record on Appeal.

Order Denying Motion to Vacate Judgment.

Notice of Appeal by Plaintiff, filed May 7, 1956.

Appeal Bond in sum \$250.00.

Appellant's Designation of Record on Appeal.

Appellee's Designation of Record on Appeal.

Reporter's Transcript of Portion of Opening Statement for Plaintiff, Feb. 21, 1956.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 24th day of May, 1956.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15142. United States Court of Appeals for the Ninth Circuit. Leeta A. Lloyd, Appellant, vs. The Franklin Life Insurance Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: May 24, 1956.

Docketed: May 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Pursuant to the provisions of Rule 17(6) Appellant files this concise statement of points on which she intends to rely:

1. On December 6, 1952, Warren William Lloyd signed an application for a policy of life insurance on printed form prepared by appellee. The application, solicited by appellee's agent, Jack O'Neil, likewise signed by O'Neil, acknowledged receipt on that date of applicant's promissory note (\$12.57) for a full month's premium. A coupon receipt was attached to the application which made insurance coverage commence not later than December 11, 1952—date of the medical examination of applicant.

Appellee has conceded a receipt was given on form prepared by it. Agent O'Neil testified (deposition) that he might have given the same form of coupon receipt from another of appellee's applications.

Lloyd passed the medical examination on December 11, 1952.

In paragraph numbered 25 of the application, which contained the printed instruction, viz.: "Use this space for special requests," there appears the hand-lettered notation: "Date policy Jan. 1, 1953."

Policy issued to Lloyd was dated January 5, 1953, and provided, "First Policy Year Begins January 1, 1953"; also that recovery thereunder would be limited to premiums paid if insured died by suicide "within two years from date of issue." Insured died by suicide December 21, 1954.

Policy provided for annual premium of \$136.63 but upon delivery parties agreed upon quarterly premiums.

2. As the coupon receipt attached to the application made coverage commence December 11, 1952, coverage was not deferred to January 1, 1953, by reason of request, in box numbered 25 of the application, to "Date policy Jan. 1, 1953."

3. A full, first month's premium was paid by the promissory note given by insured on December 6, 1952.

4. "Date of issue" as used in the suicide clause means date when coverage commenced.

5. To construe request of applicant as to dating policy Jan. 1, 1953, so as to make commencement of coverage nearly a month later than date of application and giving of promissory note for full month's premium, would have the effect of giving appellee a premium without any consideration or insurance contract obligation on appellee's part.

6. Applicant was entitled to receive from appellee's agent the company's form of coupon receipt attached to the application when applicant gave his

promissory note. The appellee cannot derive any advantage from the failure of its agent to give the receipt.

7. The coupon receipt attached to the application made coverage commence on December 11, 1952, date of medical examination. Applicant's suicide on December 21, 1954, was more than two years later.

8. The coupon receipt attached to the application is a cover note. It is a contract of insurance with coverage commencing December 11, 1952.

9. The words in box 25 of the application, to wit: "Date Policy Jan. 1, 1953," should be construed so as to preserve the right, evidenced by the promissory note and coupon receipt therefor, of applicant to have insurance coverage commence on December 11, 1952. The premium paid by promissory note on December 6, 1952, applied to the short-term coverage for the period December 11, 1952, to the date of delivery of the policy.

10. Any doubts, inconsistencies or ambiguities in the construction of the insurance contract must be resolved in favor of the insured and against the insurance company. This rule is applicable to the question of the date of commencement of insurance coverage.

11. The interim coverage given by the cover note commencing December 11, 1952, and the coverage which the policy says begins January 1, 1953, constitute a single contract. The application and the

policy are to be construed together as parts of the same contract.

12. California Insurance Code Section 10115 is applicable. Its interim coverage provisions cannot be waived. One of its purposes is to provide interim coverage for the benefit of the insurance contract beneficiary who usually does not, and in this case did not, participate in the negotiations for the contract of insurance.

13. California Insurance Code Sections 382 and 383 are applicable.

Dated: San Francisco, California, June 4, 1956.

/s/ NEIL CUNNINGHAM,

/s/ C. W. RICKETTS,

Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed June 4, 1956.

No. 15,142

IN THE

United States Court of Appeals
For the Ninth Circuit

LEETA A. LLOYD,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

NEIL CUNNINGHAM,

1508 Hobart Building, 582 Market Street,
San Francisco 4, California,

C. W. RICKETTS,

131 West Main Street, Los Gatos, California,

Attorneys for Appellant.

FILED

OCT 10 1956

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Jurisdictional statement	1
Statement of the case	2
Questions involved	4
Specification of errors	5
Argument—Points and authorities	5
I. Payment of premium at time of application	5
II. Receipt for payment of first month's premium	6
III. Applicant Lloyd was entitled to the receipt giving interim coverage	7
IV. The application, cover note (receipt), medical examina- tion report and policy constitute the insurance con- tract	9
V. Request in application to "date policy Jan. 1, 1953"	10
VI. Law requires insurance coverage from date of medical examination	11
Conclusion	15

Table of Authorities Cited

Cases	Pages
Aetna Life Ins. Co. v. Geher (9th CCA), 50 F. 2d 657	9
American National Ins. Co. v. Thompson (Tex. Ct. of Civ. Appeals 1916), 186 SW 254	13
Anderson v. Mutual Life Ins. Co., 164 Cal. 712, 130 Pac. 726	14
Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal. 2d 731	11
Fox v. New York Life Ins. Co., 211 Ill. App. 406	13
Gaunt v. John Hancock Life Ins. Co. (2d CCA), 160 F. 2d 599	7, 12
Griffith v. New York Life Ins. Co., 101 Cal. 627	7
Harrigan v. Home Life Ins. Co., 128 Cal. 531	7
Hart v. Travelers Ins. Co., 258 NYS 711, affm'd (1933) NY Ct. Appeals, 185 N.E. 739	7
Horowitz v. New York Life Ins. Co. (9th CCA 1935), 80 F. 2d 296	14
Jefferson Standard Life Ins. Co. v. Wilson (1919 5th CCA), 260 F. 593	13
Jones v. International Indemnity Co., 39 Cal. App. 706 . . .	7
Krebs v. Philadelphia Life Ins. Co. (Pa. 1915), 249 Penn. 330, 95 A. 91	13
Malmgren v. Southwestern Ins. Co., 201 Cal. 29	8
Masson v. New England Mutual Life Ins. Co., 85 Cal. App. 633	7
Mutual Life Ins. Co. v. Hurni Packing Co. (1923), 263 U.S. 167, 68 L.Ed. 235, 44 S.Ct. 90	14
Narver v. Calif. State Life Ins. Co., 211 Cal. 176, 294 Pac. 393	8, 9, 11
New York Life Ins. Co. v. Abromietes, 236 N.W. 769, 254 Mich. 622	7

TABLE OF AUTHORITIES CITED

iii

	Pages
Pendell v. Westland Life Ins. Co., 95 Cal. App. 2d 766 ...	11
Pig. v. Indemnity Co., 86 Cal. App. 671	9
Ransom v. Penn Mutual Life Ins. Co., 43 Cal. 2d 420, 274 Pac. 2d 633	7, 8, 9, 11, 12, 13
Ritchie v. Anchor Casualty Co., 135 Cal. App. 2d 245, 286 P. 2d 1000	11
Stanley v. Columbia Casualty Co., 63 Cal. App. 2d 724, 147 Pac. 2d 627	8
Vierre v. New York Life Ins. Co., 119 Cal. App. 352	7

Codes

California Insurance Code:	
Section 382	8
Section 384	6
28 U.S.C.A.:	
Sections 1291 and 1294(1)	2
Section 1332	1

No. 15,142

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LEETA A. LLOYD,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

The Complaint (TR 3-5) filed in this action in the District Court seeks recovery of benefits provided by a Policy of Life Insurance in the amount of \$12,400.00 issued by Appellee to Warren William Lloyd. Appellant is the beneficiary named therein.

The Answer (TR 6-7), denying certain allegations of the Complaint, sets up three defenses, the third being that the insured died by self-destruction within two years of the date of issue of the policy.

The jurisdiction of the District Court was invoked under 28 USCA Section 1332, appellant being a citizen of the State of California and appellee being a corporation organized and incorporated under the laws of the State of Illinois.

The jurisdiction of this Court is invoked under 28 USCA Sections 1291 and 1294(1).

STATEMENT OF THE CASE.

The insured, under the policy in question, made written application to appellee (TR 34-48) at San Jose, State of California, on the 6th day of December, 1952 for a life insurance policy in the amount of \$13,000.00. (TR 35.) He was solicited by appellee's agent, Jack O'Neil. (TR pp. 48, 69.) At that time he executed and delivered to said agent a promissory note for \$12.57 (TR pp. 46, 95, 69) which represented one full month's premium. (TR pp. 69, 93, 94—see also Exhibit A at p. 76, column heading "monthly".) The receipt attached to the application (TR pp. 50, 51), required by appellee to be given when "settlement toward first premium is collected at time of application" (Exhibit B, TR pp. 65-67), provided that "the insurance shall be effective in accordance with the provisions of the policy applied for *from the date* of this application or the date *of the medical examination*, if a medical examination was required, whichever is the later." (Italics used for emphasis—TR 66.)

The date of the medical examination of Lloyd was *December 11, 1952*.

A policy of life insurance bearing number 1127042 (TR pp. 8-49) was thereafter delivered to the insured Warren William Lloyd "sometime after January 5, 1953." (Appellee's Reply to Request to Admit, par.

5, TR 60.) It provides for payment to insured's beneficiary, the appellant, the "double benefit" of \$3,000 "if Insured shall die before the end of the policy year on which the Insured's age nearest birthday is 65 years" *plus* an amount calculated pursuant to the table (TR 32) under the provisions "for Additional Insurance Adapted to Mortgage Redemption Purposes". (TR 31.) The effective date of the first policy year was December 11, 1952, the date of the medical examination of insured; the third policy year began December 11, 1954. Death of the insured occurred on December 21, 1954, which is in the *third* policy year. Therefore, using the table (TR 32) for Additional Insurance, appellee became obligated to pay appellant beneficiary, in addition to the "Double Benefit" of \$3,000 provided in the policy (TR 8) ten times \$940 or \$9,400, making the total of \$12,400, plus interest. (TR pp. 31-32.)

Insured was born March 14, 1920 or May 14, 1920. (TR pp. 35, 40.) At his death on December 21, 1954, he was under the age 65 nearest birthday to the end of that policy year; he was aged 34.

The policy in question which was issued and delivered to the insured contains "Incontestability" and "Suicide" clauses. (TR 11.) The latter clause is invoked by appellee in defense of its obligation to pay appellant, the beneficiary thereunder, any more than "the amount of premiums paid" on the policy.

But for applicant's request in the application, viz: "Date Policy Jan. 1, 1953" (TR 46), appellee admits that the effective date of the policy would have been

December 11, 1952 and that the two year suicide period would have expired December 11, 1954. (TR 54.) As hereinbefore stated, the date of the medical examination of the applicant was December 11, 1952.

The policy provides (TR 9):

“Consideration: This insurance is granted in consideration of the *application* herefor and of the payment in advance of the premiums as herein provided. * * *”

It is appellant's contention that the insurance coverage provided by said policy was in force and effect from the date of the medical examination of applicant-insured, to-wit: December 11, 1952, and that death of the insured, having occurred more than two years thereafter, the suicide clause of the policy is not applicable.

QUESTIONS INVOLVED.

1. Was the insured without “interim coverage” between the date of the medical examination, December 11, 1952, for which he paid by delivery of note in the amount of \$12.57 representing a full month's premium, and the date of the policy?

2. Did his request in the application for insurance “Date policy Jan. 1, 1953” defer commencement of the risk to Jan. 1, 1953, when, at the same moment the application was signed, he executed and delivered his note for a full month's premium, receipt of which is acknowledged in the application attached to the policy and receipt for which was given to insured?

3. May a life insurer escape its just obligation to a beneficiary under a policy which incorporates provisions of an application that constitutes, in effect, interim coverage antedating the policy and for which a premium was paid?

SPECIFICATION OF ERRORS.

1. The District Court erred in assuming that insured's request to date the policy Jan. 1, 1953 eliminated any issue as to a material fact.

2. The District Court erred in denying appellant's motion for summary judgment.

3. The District Court erred in granting appellee's motion for summary judgment.

ARGUMENT—POINTS AND AUTHORITIES.

I.

PAYMENT OF PREMIUM AT TIME OF APPLICATION.

A promissory note for \$12.57 was given by applicant-insured to appellee's agent, O'Neil, in payment of a full month's premium at the time the application for the insurance in question was made (TR pp. 93, 95) on December 6, 1952. (TR 48.)

Acknowledgment of such payment of premium is contained in the application, made part of the policy of life insurance thereafter issued to Lloyd. (TR 46, par. reading: "There has been delivered to the agent the sum of \$12.57 in notes, on account of the first premium.")

II.

RECEIPT FOR PAYMENT OF FIRST MONTH'S PREMIUM.

A receipt (see Exhibit B, TR pp. 65-67, at 66) was given for the first month's premium payment on December 6, 1952. Whether it bore the same (printed) number as the application or was one detached from an identical application form, the agent O'Neil testified he "couldn't swear definitely that it was" but that it was his "usual procedure to give a receipt * * * I must have given him a receipt." (TR 91.) In addition thereto appellee has conceded, for the purposes of the motion (summary judgment) "that the receipt attached to the application or a receipt substantially similar in form was given to the insured." (TR 64.)

But whether the identical form of receipt attached to the application, a form similar in content thereto, or whether any receipt was actually given, acknowledgment of payment of the \$12.57 representing a full month's premium was made in the application which, upon issuance of the policy of insurance, was attached to and became a part of the policy. (TR 46.) Furthermore, appellant cannot be deprived of rights under the policy by the failure of appellee's agent to give the receipt to the applicant, Lloyd.

Section 384 of the California Insurance Code provides:

"An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the payment is actually paid."

III

**APPLICANT LLOYD WAS ENTITLED TO THE RECEIPT
GIVING INTERIM COVERAGE.**

Under the terms and provisions of the Receipt attached to the application "or a receipt substantially similar" (TR 64, 91) Lloyd was entitled to interim coverage from the date of medical examination, to-wit: December 11, 1952. In the case of *Ransom v. Penn Mutual Life Ins. Co.*, 43 Cal. 2d 420, 426, 274 Pac. 2d 633, the Supreme Court declared:

"There is no merit in defendant's contention that it is not bound by the contract because its agent, in acknowledging payment of the premium, failed to use the receipt form attached to the application."

See also:

Gaunt v. John Hancock Life Ins. Co. (2d CCA), 160 F. 2d 599;

Griffith v. New York Life Ins. Co., 101 Cal. 627, 636;

Harrigan v. Home Life Ins. Co., 128 Cal. 531, 541, et seq.;

Hart v. Travelers Ins. Co., 258 NYS 711, 716, affm'd (1933) NY Ct. Appeals, 185 N.E. 739;

Jones v. International Indemnity Co., 39 Cal. App. 706, 709;

Masson v. New England Mutual Life Ins. Co., 85 Cal. App. 633, 639;

New York Life Ins. Co. v. Abromietes, 236 N.W. 769, 254 Mich. 622;

Vierre v. New York Life Ins. Co., 119 Cal. App. 352, 359, 360.

The receipt provided (TR 66):

“* * * First: It is agreed that (1) if the entire first premium * * * is paid to an authorized agent of the Company at the time of making this application and (2) if the Company shall be satisfied after investigation and medical examination, * * * that the proposed insured was * * * an acceptable risk for the amount of insurance * * * the insurance shall be effective in accordance with the provisions of the policy applied for from the date of * * * the medical examination * * *.”

The receipt given to insured provided, in effect, for coverage commencing on the date of the medical examination, December 11, 1952. It constituted interim coverage and became a part of the policy of insurance subsequently issued and delivered to insured.

Ransom v. Penn Mutual Life Ins. Co., supra.

It was an effective cover note and became merged with the policy.

Narver v. Calif. State Life Ins. Co., 211 Cal. 176, 180, 294 Pac. 393.

Section 382 of the California Insurance Code provides that the policy subsequently to be issued shall include within its terms the identical insurance bound under the cover note (receipt). Lloyd was entitled to the interim coverage provided thereby.

Stanley v. Columbia Casualty Co., 63 Cal. App. 2d 724, 732, 147 Pac. 2d 627.

California statutory provisions on the subject are deemed to be in contemplation of the parties as part of the insurance contract.

Malmgren v. Southwestern Ins. Co., 201 Cal. 29, 33.

The statutory provision being part of the contract of insurance, any uncertainties or conflicts that may arise must be resolved in favor of the insured or his beneficiary.

Pig. v. International Indemnity Co., 86 Cal. App. 671, 673.

“The laws of the State of California entered into and became a part of the contract of insurance. *Walker v. Whitehead*, 16 Wall. (83 U.S.) 314, 21 L.Ed. 357. * * *

Aetna Life Ins. Co. v. Geher (9th CCA), 50 F. 2d 657, 658.

IV.

THE APPLICATION, COVER NOTE (RECEIPT), MEDICAL EXAMINATION REPORT AND POLICY CONSTITUTE THE INSURANCE CONTRACT.

The cover note (receipt) initiated life insurance coverage which commenced with the medical examination of Lloyd on December 11, 1952.

Narver v. Cal. State Life Ins. Co., *supra*;

Ransom v. Penn Mutual Life Ins. Co., *supra*.

The policy issued to Lloyd provides:

“This policy and the application therefor, a copy of which is hereto attached and made a part hereof, constitute the entire contract between the parties.” (TR 14.)

The cover note (receipt) was attached to the application *when made* (TR pp. 88, 91, 55, 64), and became part of the policy or contract of insurance.

V.

REQUEST IN APPLICATION TO "DATE POLICY JAN. 1, 1953".

The request of applicant to date the policy "Jan. 1, 1953" is clearly compatible with interim coverage provided by payment of \$12.57 for one full month's premium, and must be reconciled with such request in favor of the insurance coverage commencement as of December 11, 1952. The two dates are consistent with the logical assumption that Lloyd wanted the insurance coverage to commence immediately he passed the physical examination given by appellee company's own doctor and that appellee required payment (\$12.57) for that interim coverage till the policy was actually delivered to him. The reasonable construction of his request for dating the policy nearly a month later than his application is that he wanted time to decide whether he would start the regular premium paying period on a monthly, quarterly, semi-annual or annual basis. Support for this construction is found in the fact that when the policy was finally delivered to Lloyd "some time after January 5, 1953," it provided for an annual premium of \$136.63 (TR 8), yet he commenced paying and continued paying the premium on a *quarterly* basis. (TR 74, 76.) No other reasonable or logical explanation can be given for the request and for the acceptance by appellee's agent of the first month's premium on December 6, 1952. Settled law requires the reconciliation to be made in order that life insurance coverage commence at the earliest date a reasonable construction of the contract will permit.

“Where two interpretations equally fair may be made, that which affords the greatest measure of protection to the assured will prevail.”

Fageol T. & C. Co. v. Pacific Indemnity Co.,
18 Cal. 2d 731, 747;

Pendell v. Westland Life Ins. Co., 95 Cal. App.
2d 766, 769.

“To that end the law makes every rational intendment in order to give full protection to the interests of the insured. *Glickman v. New York Life Ins. Co.*, 16 Cal.2d 626, 635; 107 Pac.2d 252; 131 A.L.R. 1292.”

Pendell v. Westland Life Ins. Co., *supra*, p.
770, 771.

See also:

Ritchie v. Anchor Casualty Co., 135 Cal. App.
2d 245, 257, 286 P. 2d 1000, 1007;

Narver v. Calif. State Life Ins. Co., *supra*;

Ransom v. Penn Mutual Life Ins. Co., *supra*.

VI.

LAW REQUIRES INSURANCE COVERAGE FROM DATE OF MEDICAL EXAMINATION.

It is the policy of the law (especially in California—*Ransom v. Penn Mutual Life Ins. Co.*, *supra*, and *Narver v. Calif. State Life Ins. Co.*, *supra*) to regard the contract of life insurance binding immediately the application is made, except where medical examina-

tion is required, subject only to later rejection, thus preventing the company from reserving the option to treat itself as debtor according to a judgment exercised with wisdom born of the event. And it is not unfair to make the insurer bear the risk as the receipt of the initial premium benefits the insurance company by discouraging a change of mind or a switch to another company on the part of the applicant and by guaranteeing reimbursement for medical and investigation expenses.

Furthermore, as was declared in the *Ramson* case, *supra*, the coverage referred to in the cover note (receipt) should commence at the earliest possible time; and the inception of the risk should not be deferred by conditions subsequent. Applicant's request in the case at bar to "date policy Jan. 1, 1953" can be construed as a condition subsequent to the commencement of insurance coverage on December 11, 1952. The *Ransom* case in effect so holds. Referring to the cover note the court in the *Ransom* case quoted from *Gaunt v. John Hancock Mutual Life Ins. Co.*, *supra*, stating that the provision in the policy that the insurance shall be in force from the date of application ~~if~~ ^{if} the premium is paid gives rise to a contract of insurance immediately upon receipt of the application and payment of the premium; that the application must be construed as to be taken by the ordinary applicant and that such person would assume he was covered from the date of the application or the date of a medical examination if such be required and that he would be getting something for his money.

In the case at bar it is apparent that the appellee's agent received and the company retained a premium for which no coverage was afforded if the construction for which appellee contends be upheld:

“There is an obvious advantage to the company in obtaining payment of the premium when the application is made, and it would be unconscionable to permit the company, after using language to induce payment of premium at that time, to escape the obligation which an ordinary applicant would reasonably believe had been undertaken by the insurer.”

Ransom v. Penn Mutual Life Ins. Co., supra,
p. 425.

The *Narver* case is the leading case involving the cover note (receipt) and the suicide clause. It was therein held that the cover note and the subsequently issued policy must be construed together as a single contract of insurance; that any doubts as to when the suicide exclusion period began to run should be resolved against the exception of risk and in favor of the beneficiary under the policy.

See also:

Fox v. New York Life Ins. Co., 211 Ill. App. 406;

Jefferson Standard Life Ins. Co. v. Wilson (1919 5th CCA) 260 F. 593;

American National Ins. Co. v. Thompson (Tex. Ct. of Civ. Appeals 1916) 186 SW 254;

Krebs v. Philadelphia Life Ins. Co. (Pa. 1915) 249 Penn. 330, 95 A. 91;

Horwitz v. New York Life Ins. Co. (9th CCA 1935) 80 F. 2d 296;

Mutual Life Ins. Co. v. Hurni Packing Co. (1923); 263 U.S. 167, 68 L.Ed. 235, 44 S.Ct. 90.

In the last above cited case the court said (p. 175):

“* * * having in mind the rule that in such cases the doubt must be resolved in the way most favorable to the insured. We conclude that the words refer not to the time of the actual execution of the policy or the time of its delivery but to the date of issue specified in the policy itself.”

The court will note, however, that in the *Hurni* case it does not establish as a rule of law that “date of issue” means the date stated on the policy, but only that such date will be taken when there is a doubt, as the court said there was in the *Hurni* case, and such date is the *date most favorable to the insured*.

In the case of *Anderson v. Mutual Life Ins. Co.*, 164 Cal. 712, 716, 130 Pac. 726, the court said:

“The day upon which, by the agreement of the parties, the risk attached, may be taken to be the day which was meant to be designated, in the clause under consideration ‘(suicide clause)’ as that of the ‘issuance’ of the policy.”

In the case at bar the risk clearly attached the date the applicant took and passed the physical examination, to-wit: December 11, 1952.

CONCLUSION.

It is respectfully submitted that the Transcript of Record and the authorities cited herein amply support appellant's right, either

- (a) To summary judgment on her complaint for the amount prayed for, \$12,400, with interest, or
- (b) To have a jury pass upon any unresolved issues of fact.

If not clearly evidenced by the Transcript of Record, these questions would be presented:

1. Did the insured, Lloyd, intend to relinquish his right to have life insurance coverage commence December 11, 1952, date of medical examination, by requesting the policy be dated January 1, 1953, when at the time of making application therefor (December 6, 1952) he paid a full month's premium?
2. Did he relinquish such right only because he requested a future dating of the policy?
3. What conceivable consideration did he get for the "full month's premium of \$12.57" demanded of him by appellee's agent if the acknowledgment of receipt therefor in the application incorporated in the policy did not afford interim coverage pending the issuance and delivery of the policy?

Dated, October 18, 1956.

Respectfully submitted,

NEIL CUNNINGHAM,

C. W. RICKETTS,

Attorneys for Appellant.

No. 15,142

In the
United States Court of Appeals
For the Ninth Circuit

LEETA A. LLOYD,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY,
a corporation,

Appellee.

Appellee's Brief

MORRIS M. DOYLE
ARTHUR R. ALBRECHT
McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
1500 Balfour Building
351 California Street
San Francisco 4, California

Attorneys for Appellee

The Franklin Life Insurance Co.

FILED

DEC 14 1956

PAUL P. O'BRIEN, CLERK

SUBJECT INDEX

	Page
Jurisdictional Statement	1
Statement of the Case.....	1
Question Involved	4
Argument	4
I. January 1, 1953 Was the Date of Issue Referred to in the Suicide Clause.....	4
II. There Was No Short-Term or Interim Insurance.....	7
III. The Law Does Not Require Insurance Coverage from Date of Medical Examination When the Applicant Re- quests that His Policy Begin at a Later Date.....	9
Conclusion	12
Appendix	

TABLE OF AUTHORITIES

	Pages
Anderson v. Mutual Life Ins. Co., 164 Cal. 712; 130 Pac. 726 (1913)	6
Horwitz v. New York Life Ins. Co., 80 F.2d 295 (9th Cir. 1935)	5, 6, 8, 9
Mutual Life Ins. Co. v. Hurni Packing Co., 263 U.S. 167; 44 Sup. Ct. 90 (1923).....	5, 6
Ransom v. Penn Mutual Life Ins., 43 C.2d 420; 274 P.2d 633 (1954), reh. den. (1954).....	10
Schwartz v. Northern Life Ins. Co., 25 F.2d 555 (9th Cir. 1928), reh. den. (1928), cert. den., 278 U.S. 628 (1928).....	6
Insurance Code of the State of California:	
§ 382	9, Appendix
§ 484	8, Appendix
§ 10115	9, 10, Appendix

No. 15,142

In the
United States Court of Appeals
For the Ninth Circuit

LEETA A. LLOYD,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY,
a corporation,

Appellee.

Appellee's Brief

JURISDICTIONAL STATEMENT

Appellee (defendant below) does not controvert the Jurisdictional Statement of appellant (plaintiff below) in Appellant's Opening Brief, pp. 1-2.

STATEMENT OF THE CASE

Warren William Lloyd applied to appellee through its agent, Jack O'Neil, on December 6, 1952, to issue him a policy of life insurance, making the special request in writing in item 25 of his application as follows:

"Use this space for special requests.
Date Policy Jan. 1, 1953."

(Tr. pp. 46 (item 25), 70). Mr. Lloyd signed the application (Tr. pp. 48, 59-60 (item 3)). Appellant has conceded in the hearing below that Mr. Lloyd requested that the policy be dated January 1, 1953 (Tr. p. 97). The application was sent to appellee's home office and policy No. 1127042 was executed there pursuant to the application on January 5, 1953 (Tr. pp. 64, 76 (box marked "ISSUED")). January 5, 1953, is the date of the testimonium clauses of the policy (Tr. pp. 9, 34). The policy was made effective as of January 1, 1953, in accordance with the special request in the application (Tr. p. 64). The outside cover and the first page of the policy clearly state "First Policy Year Begins: January 1, 1953." (Tr. pp. 8, 48). This policy was delivered to Mr. Lloyd by Mr. O'Neil and Mr. Lloyd accepted it in January, 1953, (Tr. pp. 69, 96).

The policy provides:

"Suicide: If within two years from date of issue the Insured (whether sane or insane) shall die by self-destruction, the liability of the Company shall be restricted to the amount of premiums paid hereon."
(Tr. p. 11)

The insured admittedly died by self-destruction on December 21, 1954 (Tr. p. 60 (item 6)). Appellee contends that the insured died by self-destruction within two years from the date of issue, January 1, 1953, which he himself specially requested, and that appellee's liability on the policy is therefore restricted by the terms of the suicide clause to the amount of the premiums paid. The premiums paid were eight *quarterly* premiums of \$36.04, a total of \$288.32 (Tr. pp. 74-76). Appellee has offered to pay this amount to appellant (Tr. pp. 4 (para. VI), 54) and appellant has rejected the offer (Tr. pp. 4-5 (para. VI)).

At the time of the application Mr. Lloyd gave Mr. O'Neil a note for \$12.57 to cover one monthly premium. When the

policy was delivered to him, Mr. Lloyd decided to pay premiums quarterly instead of monthly and therefore gave Mr. O'Neil his check for \$36.04 to cover the first quarterly premium from January 1, 1953, to March 31, 1953. His note for \$12.57 was returned or destroyed. No payment was ever made upon it (Tr. p. 69). At no time did the applicant request short term or temporary insurance pending the issuance of his policy effective January 1, 1953 (Tr. p. 70). There is no evidence in the record to contradict this account of the transaction by Mr. O'Neil. Mr. Lloyd paid only the eight quarterly premiums for the two years 1953 and 1954 (Tr. pp. 74-76).

The receipt attached to the application for the policy was not in fact given to the applicant at the time of the application but was left attached to the application and was still attached to the application when the application was received by appellee at its home office (Tr. p. 64). That receipt was not required by appellee to be given to the applicant, as appellant states, nor did the applicant have a right to the receipt attached to the application in view of his request to postdate the policy. Appellee has conceded below for the purpose of *its* motion for summary judgment *only* “* * * that a receipt on a form prepared by defendant was given to the insured.” (Tr. p. 67). The receipt form provides that “* * * the insurance shall be effective in accordance with the provisions of the policy applied for * * *” (Tr. p. 66). The provisions of the policy applied for include the special request in the application to date the policy January 1, 1953, which is part of the contract between the parties (Tr. p. 14).

The present appeal is taken from the Judgment of Judge Edward P. Murphy on February 27, 1956, on defendant's (appellee's) motion for summary judgment and plaintiff's

(appellant's) countermotion for summary judgment (Tr. pp. 78, 83, 85). The Judgment decreed that there is no genuine issue as to any material fact, that defendant is entitled to judgment as a matter of law, that the action be dismissed on the merits and that defendant recover its costs. (Tr. p. 78).

QUESTION INVOLVED

Was the death of the insured by self-destruction on December 21, 1954, within two years from the "date of issue" of the policy referred to in the suicide clause, thus restricting appellee's liability on the policy to the amount of premiums paid?

ARGUMENT

I. January 1, 1953, Was the Date of Issue Referred to in the Suicide Clause.

Appellee's liability on the policy is restricted to the amount of premiums paid if the death of the insured by self-destruction on December 21, 1954, was within two years from the date of issue of the policy within the meaning of the suicide clause. That date of issue was January 1, 1953. The death of the insured was within two years thereafter and the liability of the appellee is thus restricted to the amount of premiums paid.

There is no dispute about the fact that the insured made the special request to date the policy January 1, 1953. That fact appears from the application (Tr. p. 46 (item 25)), which he admittedly signed (Tr. pp. 48, 59-60 (item 3)), and it was conceded by counsel for appellant in the opening statement in the hearing below (Tr. p. 97). The application was an application to appellee to issue the applicant a policy. The request in the application was directed to the issu-

ance of the policy. The request "Date Policy Jan. 1, 1953" was therefore in common sense and ordinary understanding a request that that date be made the date of issue.

The policy was actually issued or executed, that is, typed and signed, on January 5, 1953, but it was made effective as of January 1, 1953, in accordance with the special request of the applicant (Tr. pp. 64, 70). That date is the effective date stated in the policy itself, which was delivered to and accepted by the applicant (Tr. p. 69), providing both on the outside cover and on the first page that: "First Policy Year Begins: January 1, 1953". (Tr. pp. 8, 48). The date of the policy year or anniversary date is the paramount date of the policy and is used for determining the dates for the main features of the insurance, such as: payment of premiums (Tr. pp. 9, 27, 30, 33), grace period (Tr. p. 10), determination of age (Tr. pp. 8, 28), loan value (Tr. p. 15), reserve basis (Tr. pp. 16-17), dividends (Tr. p. 17), extended insurance (Tr. p. 20), paid-up insurance (Tr. p. 20), cash surrender value (Tr. p. 21), application of non-forfeiture and loan value tables (Tr. pp. 22-3), mortgage redemption provisions (Tr. pp. 31-32). It is also the basis upon which premiums actually were paid (Tr. pp. 74-76).

This Court has held that the request of an applicant to date a policy of life insurance as of a certain date fixes the "date of issue" for purposes of the incontestability clause, *Horwitz v. New York Life Ins. Co.*, 80 F.2d 295, 298-300 (9th Cir. 1935). The policy in that case provided that it should be incontestable after two years from its "date of issue". The applicant had instructed the insurer in his application to "Date Policy as of Sep. 29, 1930." This Court held, relying upon the decision of the Supreme Court of the United States in *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U.S. 167, 44 Sup. Ct. 90 (1923), that the "date of issue"

was the date of the testimonium clause, but that the effect of the request in the application to date the policy as of September 29, 1930, made that date the effective date of the testimonium clause and thus the date of issue. The *Mutual Life* and *Horwitz* cases involved incontestability clauses and not a suicide clause, but their reasoning is controlling in the instant case. The language of the request in the *Mutual Life* case, "Date Policy August 23, 1915;" and in the *Horwitz* case, "Date Policy as of Sep. 29, 1930," and the language of the request in this case, "Date Policy Jan. 1, 1953" are to the same effect. The applicant made his request in the item marked "Use this space for special requests." (Tr. p. 46). January 1, 1953, is therefore the date of issue of the policy. The request of the applicant "* * * would have no effect whatsoever unless given this interpretation, * * * regardless of the rule of construction favoring the insured." *Horwitz v. New York Life Ins. Co.*, 80 F.2d 295, 299 (9th Cir. 1935). The parties were competent to choose the date on which the policy was to go into effect. See *Schwartz v. Northern Life Ins. Co.*, 25 F.2d 555 (9th Cir. 1928), reh. den. (1928), cert. den., 278 U.S. 628 (1928); *Anderson v. Mutual Life Ins. Co.*, 164 Cal. 712; 130 Pac. 726 (1913).

Counsel for appellant have argued that the reasonable construction of the request by the insured that the policy be dated January 1, 1953, is that "* * * he wanted time to decide whether he would start the regular premium paying period on a monthly, quarterly, semi-annual or annual basis." (Op. Br., p. 10). Such a construction is not reasonable. It is at best a strained attempt to find an alternative for the obvious meaning of the request of the applicant that the policy was to go into effect on the first of the year then just about to start.

II. There Was No Short-Term or Interim Insurance.

There was no short-term or interim insurance in this case. The insured did not apply for such insurance in his application (Tr. pp. 40 (item 5), 48), and it is the uncontradicted testimony of the agent, Mr. O'Neil, that the applicant at no time made a request for short-term or temporary insurance pending the issuance of his policy, which was to be effective January 1, 1953 (Tr. p. 70). The procedure for such insurance was not followed (Tr. pp. 70, 71-3). No premium for the short-term insurance accompanied the application as required for short-term insurance (Tr. p. 72). There was no actual payment for such insurance. The applicant's note of \$12.57 for the first month's premium on the policy to start January 1, 1953, was given to cover the month of January, 1953, when the applicant requested the policy to start. The applicant's request and the policy itself made January 1, 1953, the beginning of the first policy year. That date is when the first premium is payable. The "Consideration" clause which appellant quotes in part (Op. Br. p. 4), provides in full:

"Consideration: This insurance is granted in consideration of the application herefor and of the payment in advance of the premiums as herein provided. *The first premium in the amount specified on the first page, is payable at the beginning of the first policy year* and subsequent premiums are payable on the anniversary of said date in every year thereafter until premiums have been paid for the period specified on the first page." (Tr. pp. 9-10). (Emphasis added.)

Furthermore, no payment was ever made on the note (Tr. p. 69). When the applicant received his policy and changed his method of paying premiums to the quarterly basis, this note was returned to him or destroyed and was superseded by his check for \$36.04 to cover the period from January 1,

1953, to March 31, 1953. The insured paid only eight quarterly premiums of \$36.04 each, or a total of \$288.32, to cover the policy years 1953 and 1954 (Tr. pp. 74-76).

Appellant seeks to find interim coverage on the basis of the receipt. Appellee conceded below, *only* for the purpose of *its* motion, that a receipt on a form prepared by the appellee was given to the insured at the time of the application (Tr. p. 67). The giving of a receipt does not create interim coverage between the time of application and the time of issuance of the policy where the applicant has made a special request to postdate the policy. The special request was one of the terms of the application and of the policy issued pursuant thereto and of the receipt. The receipt does not vary the terms of the insurance applied for but expressly provides that it is subject to them. The receipt states that “* * * the insurance shall be effective in accordance with the provisions of the policy applied for * * *”. One of those provisions was the special request to postdate the policy, which was one of the terms of the contract between the parties (Tr. p. 14). The application in *Horwitz v. New York Life Ins. Co.*, 80 F.2d 295, 299 (9th Cir. 1935), contained substantially similar language, and this Court there held that such language made the requested date the “date of issue” as part of the contract between the parties.

The statutes and cases cited by appellant do not support the theory of interim insurance. Section 484 of the California Insurance Code* provides only that an acknowledgment of receipt of premium is conclusive evidence of payment so far as to make the policy binding, notwithstanding any stipulation in the receipt to the contrary. It does not alter

*Appellant has referred to section 384 (Op. Br. p. 6) but presumably means section 484. The section is set out in the Appendix below.

the provisions of the policy applied for or the effect of the applicant's special request. Section 382† of the California Insurance Code providing for the issue of covering notes is not relevant to the question before the Court. Appellee does not contend that such notes may not be issued. It contends that no such note ever was issued for interim coverage from December 11, 1952. The receipt conceded to have been given could hardly be a covering note for coverage from December 11, 1952, when it was a receipt for, and was subject to, an application wherein the applicant himself requested later coverage. None of the cases cited by appellant involves a request to postdate the policy, which is the nub of this case.

III. The Law Does Not Require Insurance Coverage from Date of Medical Examination When the Applicant Requests That His Policy Begin at a Later Date.

Appellant argues that the law requires insurance coverage from the date of medical examination and that the request to postdate the policy is compatible with prior coverage or is at any rate an ambiguity which should be resolved, according to well-established principles, in favor of the insured. It is not reasonable to suppose that the applicant's request to postdate the policy January 1, 1953, meant anything other than that he wanted the policy to start at the beginning of the year. There is no ambiguity about it, and the rule of construction favoring the insured cannot change it. *Horwitz v. New York Life Ins. Co.*, 80 F.2d 295, 299 (9th Cir. 1935). Section 10115* of the California Insurance Code, relied upon by appellant in the Statement of Points (Tr. p. 104 (item 12)), but not referred to in Appellant's Opening

†See Appendix below.

*See Appendix below.

Brief, foresees and provides for such a request. That section provides for coverage of the insured under certain conditions if he should die after application and payment of premium and approval of the policy by the insured but before the policy is actually issued. The section states that the insurer is liable when “* * * the person to be insured dies on or after the date of the application, on or after the date of the medical examination, if any, or on or after any date specially requested in the application for the policy to take effect, *whichever is later* * * *”. (Emphasis added.) Thus the statute clearly intends that a policy is not to go into effect before the date specially requested by the insured. If Mr. Lloyd had died after his application but before January 1, 1953, appellee would not have been liable, since coverage did not start until that date. The two year period of the suicide clause could not have started to run before that date.

Appellant's suggestion that the request to postdate the policy be construed as a condition subsequent would make the request meaningless. *Ransom v. Penn Mutual Life Ins. Co.*, 43 C.2d 420; 274 P.2d 633 (1954) reh. den. (1954), cited as authority for this proposition, surely did not hold this, for it did not involve a request to postdate, nor did any of the other cases cited by appellant.

Appellant argues that if the special request to date the policy January 1, 1953, is to be given effect, then the insured, in giving the agent a promissory note on December 6, 1952, for a monthly premium, was parting with a consideration and receiving nothing in return. But the obvious effect of the note, taken together with the special request to date the policy January 1, 1953, was to make the policy effective from that date, regardless of when it was in fact issued or delivered. Actually the policy was not issued until January

5, 1953, and it was not delivered until some time later than that, but it was effective from January 1, 1953, by virtue of the special request and the promissory note for the first month's premium. The consideration for the note was the coverage which the applicant received from the effective date of the policy. When the policy was delivered by the agent to the insured, the latter decided to pay the premiums quarterly and gave a check for the first quarterly premium for the quarter commencing January 1, 1953. The agent, who had personally retained the note, then returned it to the insured or destroyed it. All subsequent premiums (Tr. p. 76), including one paid by the beneficiary (Tr. p. 58), were paid on a quarterly basis measured from January 1, 1953.

Upon these undisputed facts, it is idle to argue that the promissory note given to the agent on December 6, 1952, was intended to pay a monthly premium for one month ending January 6, 1953, or January 11, 1953 (being one month after the medical examination). The insured never paid the promissory note, and the only premiums ever paid were quarterly for the period commencing January 1, 1953. Appellant's argument is surely without merit in the light of the fact that only eight quarterly premiums were paid on the basis of the policy date which was expressly requested by the applicant. Under these circumstances, if the policy were deemed effective from December 11, 1952, the insured received 20 days of insurance protection for which he never paid.

CONCLUSION

There is no genuine issue as to any material fact; both parties moved for summary judgment in the court below. Appellee is entitled to judgment as a matter of law, and the action was rightly dismissed on the merits with costs to the defendant. The judgment below should be affirmed with costs of appeal to appellee.

Respectfully submitted,

MORRIS M. DOYLE

ARTHUR R. ALBRECHT

McCUTCHEN, THOMAS, MATTHEW,

GRIFFITHS & GREENE

1500 Balfour Building

351 California Street

San Francisco 4, California

Attorneys for Appellee

The Franklin Life

Insurance Co.

(Appendix Follows)

Appendix

Insurance Code of the State of California :

“§ 382. *Covering notes: Time for issuance of policy: Extension or renewal of covering notes.*

[*Issuance of covering notes: Time for issuance of policy: Terms.*] Covering notes may be issued to bind insurance temporarily pending the issuance of the policy. Within 90 days after issue of a covering note a policy shall be issued in lieu thereof, including within its terms the identical insurance bound under the covering note and premium therefor.

“[*Extension or renewal of covering notes: Rules and regulations.*] Covering notes may be extended or renewed beyond such 90 days with the written approval of the commissioner if the commissioner determines that such extension is not contrary to and is not for the purpose of violating any provision of this code. The commissioner may promulgate rules and regulations governing such extensions for the purpose of preventing such violations and may by such rules and regulations dispense with the requirement of written approval by him in the case of extensions in compliance with such rules and regulations.”

“§ 484. *Acknowledgment of receipt of premium in policy as conclusive evidence of payment.* An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.”

“§ 10115. *Binders; death of insured before issuance of policy.* When a payment is made equal to the full first premium at the time an application for life insurance other than group life insurance is signed by the applicant and either (1) the applicant received at that time a receipt for said payment on a form prepared by the insurer, or (2) in the absence of such a receipt the

insurer receives the said payment at its home office, branch office, or the office of one of its general agencies, and in either case the insurer, pursuant to its regular underwriting practices and standards, approves the application for the issuance by it of a policy of life insurance on the plan and for the class of risk and amount of insurance applied for, and the person to be insured dies on or after the date of the application, on or after the date of the medical examination, if any, or on or after any date specially requested in the application for the policy to take effect, whichever is later, but before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the same manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant. The provisions of this section shall not prohibit an insurer from limiting the maximum amount for which it may be liable prior to actual issuance and delivery of the policy of life insurance either to (1) an amount not less than its established maximum retention, or to (2) fifty thousand dollars (\$50,000), if a statement to this effect is included in the application."

No. 15,142

United States Court of Appeals
For the Ninth Circuit

LEETA A. LLOYD,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

NEIL CUNNINGHAM,

1508 Hobart Building, 582 Market Street,
San Francisco 4, California,

C. W. RICKETTS,

131 West Main Street, Los Gatos, California,

Attorneys for Appellant.

FILED

JAN - 8 1957

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Comment on appellee's statement of the case and authorities	1
Statement of the case	1
Comment on authorities	2
Further argument in support of appellant's position	4
California Insurance Code, Section 10115	8

Table of Authorities Cited

Cases	Pages
Gaunt v. John Hancock Mutual Life Insurance Company, 160 F. 2d 599 (certiorari denied 331 U.S. 849, 91 L. Ed. 1858, 67 S. Ct. 1736)	4, 5, 7
Hart v. Travelers Ins. Co., 258 N.Y.S. 711, affm'd (1933) N.Y. Ct. Appeals, 185 N.E. 739	8
Horwitz v. New York Life Ins. Co. (9th Cir. 1935), 80 F. 2d 295	3
Liberty National Life Insurance Company v. Hamilton (6th Circuit 1956), 237 F. 2d 235	5
Mutual Life Ins. Co. v. Hurni Packing Co., 263 U.S. 167, 68 L. Ed. 235, 44 S. Ct. 90	2, 4
Ransom v. The Penn Mutual Life Insurance Company, 43 Cal. 2d 420, 274 P. 2d 633	4, 5
Ruhlin v. New York Life Insurance Company, 304 U.S. 202, 82 L. Ed. 1290, 58 S. Ct. 860	4
Siegleman v. Cunard White Star (2d Cir. 1954), 221 F. 2d 189	7
Stonsz v. Equitable Life Assurance Society (Supreme Court of Pa. 1936), 324 Pa. 97, 187 A. 403, 107 A.L.R. 178	5, 6
Stroehmann v. Mutual Life Ins. Co. of New York, 300 U.S. 435, 81 L. Ed. 732, 57 S. Ct. 607	3

Texts

2 A.L.R. 2d 943	8
60 Harvard Law Review 1164	5
7 Stanford Law Review 292	5
15 University of Chicago Law Review 379	5, 6, 7

United States Court of Appeals For the Ninth Circuit

LEETA A. LLOYD,

Appellant,

VS.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

COMMENT ON APPELLEE'S STATEMENT OF THE CASE AND AUTHORITIES.

Statement of the Case.

At pages 2 and 3 of appellee's brief, appellee has "twisted" (as that term is well known among insurance people) the factual record. By dogged repetition, by statement of half-truths and by devious incomplete citation and reference to the Record Transcript, the company has sought to establish "date of issue" of its insurance policy as of January 1, 1953, a date less than two years from the suicide of the insured.

The *question at issue* is whether payment of a periodic premium, demanded and received at the time of application, makes effective insurance coverage from the date of medical examination of the insured.

“Date of issue” of a policy *is not determined*, for the purpose of commencement of coverage, by a request for dating the policy. The insurance, for which Lloyd made application, went into effect and he was covered from the date he passed the medical examination, to-wit: December 11, 1952, which was ten days after the two year period specified in the suicide provision of the policy.

The argument of appellee is wholly specious and untenable that the note for a full month’s premium which the agent of appellee demanded and accepted on December 6, 1952 with the application was simply a token of good faith that Lloyd would accept and pay the premium for the policy if and when it was issued. The receipt of the “full one month’s premium” was acknowledged, made part of the policy ultimately issued, and the agent testified a receipt therefor was given to the insured. (TR, bottom page 91.)

Comment on Authorities.

As is pointed out at page 14 of appellant’s opening brief, the court, in

Mutual Life Ins. Co. v. Hurni Packing Co., 263

U. S. 167; 68 L. Ed. 235; 44 S.Ct. 90

did not hold that “date of issue” is the date of the testimonium clause or the date (in this case January 1, 1953) when the policy by its terms as therein stated went into effect, but *is the date most favorable to the insured* when there is a doubt or ambiguity as to when the risk commenced.

See also,

Stroehmann v. Mutual Life Ins. Co. of New York, 300 U. S. 435, 81 L. Ed. 732, 57 S.Ct. 607.

In

Horwitz v. New York Life Ins. Co., (9th Cir. 1935) 80 F. 2d 295

cited in appellee's brief at pages 5, 6, 8 and 9, this court construed the phrase "date of issue", stating:

"If there is any ambiguity as to whether or not the words 'its date of issue' refer to the previous agreement or to the words 'said policy', the ambiguity must be resolved in favor of the latter construction, for, so construed, the contestability period expired at the date most favorable to the insured."

This court in that case also said that in view of the application making the insurance effective from and after the date of application, "date of issue", as used in connection with commencement of the incontestability clause could mean: (a) date of application; or (b) anniversary date of policy; or (c) date on which it is purported on its face to be signed; or (d) date of issue and receipt by the insured. The court then said:

"The ambiguity arises from the act of the draftsman in so framing the policy that, under conditions likely to arise, a question of construction also arises as to which of the four circumstances in the creation of the insurance contract fixes the date of issue."

The court held the resolution of the doubt should be in favor of the insured, referring to the *Hurni* case, *supra*.

**FURTHER ARGUMENT IN SUPPORT OF
APPELLANT'S POSITION.**

As the construction of the policy is governed by the law of California and the decisions of the courts of California,

Ruhlin v. New York Life Insurance Company,
304 U.S. 202, 82 L.Ed. 1290, 58 S.Ct. 860,

this court must apply the law of California with respect to construction of insurance policies, as the policy involved in the case at bar was applied for and delivered in California. The law of California is stated in

Ransom v. The Penn Mutual Life Insurance Company, 43 Cal. 2d 420, 274 P.2d 633,

where the Supreme Court adopted the principle of construction set forth in

Gaunt v. John Hancock Mutual Life Insurance Company, 160 F.2d 599 (certiorari denied 331 U.S. 849, 91 L.Ed. 1858, 67 S.Ct. 1736).

The Supreme Court of California in the *Ransom* case, referring to the *Gaunt* case stated that insurance shall be in force from the date of application if the premium is paid and that an application must be construed as it would be taken by the ordinary applicant; and such a person would assume that he was getting

immediate insurance for his money; and that where the provisions of the application are ambiguous and susceptible of two different constructions the ambiguity must be resolved against the company.

The *Ransom* case is reviewed in 7 Stanford Law Review, 292.

A recent case citing many authorities and applying the rule of the *Gaunt* case is

Liberty National Life Insurance Company v. Hamilton (6th Circuit 1956), 237 F.2d 235.

Articles in 60 Harvard Law Review, 1164, and 15 University of Chicago Law Review 379, are therein cited; also

Stonsz v. Equitable Life Assurance Society
(Supreme Court of Pa. 1936), 324 Pa. 97,
187 A. 403, 107 A.L.R. 178.

The court in the *Stonsz* case discusses the reasons why the binder gives immediate coverage.

The article in 60 Harvard Law Review, 1164, which is a note on the *Gaunt* case, *supra*, points out that unless the binding receipt is regarded as effecting immediate coverage, it will be increasingly regarded as either an ineffective vehicle for carrying out intention, or, at worst an instrument of deception; and that a failure to extend to life insurance the traditional instantaneous coverage long afforded by fire insurance may indicate an unresponsiveness to the type of service the public requires.

Stonsz, *supra*, points out that the trend of decisions is to treat the binding receipt as giving immediate

coverage, on the theory that if the binding receipt means anything at all, no other result could have been intended by the parties; for, unless applicant was to be protected against death during the interim period, there would be no advantage in paying a premium in advance. And further, if the company did not intend there should be insurance effective pending the date of application and date of approval of the risk and issuance of the policy, then the company would be charging and obtaining a premium for something the applicant did not receive.

The court in *Stonsz*, supra, also said that if construction of the binding receipt is not that the applicant was thereby insured from date of the binder unless a formal policy was issued or the risk declined, then it must be said the binding receipt is at least ambiguous. And, if so, it should be construed against the company, it having been drawn up by the agent of the company upon its printed form.

The *Gaunt* case, supra, is also noted in 15 University of Chicago Law Review 379. This Law Review article points out that the life insurance policy contract, of which the application is a part, is a contract of "adhesion" as the applicant for insurance really has no choice in the bargaining. He must take or leave the printed form. An additional comment on the contract of adhesion appears in the opinion written by Judge John M. Harlan when he was a member of the United States Court of Appeals for the 2d Circuit.

In

Siegleman v. Cunard White Star (2d Cir. 1954), 221 F.2d 189, 202, 204-206,

Judge Harlan points out, at page 205, that in the "contract of adhesion" there is no possibility of real bargaining and that "the courts will do justice by forthrightly, not obliquely, articulating important doctrines of public policy." Appellant submits that it is an important doctrine of public policy that life insurance coverage should commence at the earliest possible moment, for life insurance is of great social benefit and the persons ultimately to benefit from the life insurance policy contract usually have no control over its formation. It is suggested by the author of the note in 15 *University of Chicago Law Review*, 379, *supra*, that Judge Hand and Judge Clark in the *Gaunt* case, *supra*, may have intended to apply a similar principle.

The *Siegleman* case was decided by the same court that decided *Gaunt*, *supra*, and Judge Clark participated in both decisions.

As Mr. Lloyd had a right to have life insurance coverage begin at the date of medical examination, December 11, 1952, having paid for it to begin then, to construe his request to date the policy January 1, 1953, as a waiver of that right would be to regard Mr. Lloyd as a fool. Why should he not want immediate coverage for his family, especially since he had paid for it? What other explanation can be made for the company's agent taking Lloyd's note?

In *Hart v. Travelers Ins. Co.*, cited at p. 7 of appellant's opening brief, the court said that to condition the insurance on issuance of the policy would be to the disadvantage of the applicant:

"... for he would be paying for insurance for a period during which he was not insured at all, namely, from the date of the binding receipt to the time when the policy should be issued. It would be more advantageous to him to keep his money and pay when the policy was ready to be delivered. This, I am sure, was not the intention of this binding receipt, which was a printed form prepared by the company. Undoubtedly it was to induce the insured to pay the full premium at the time the receipt was to be given. He undoubtedly thought he was getting some advantage by making this full payment at this time. He did not believe that by furnishing this premium in full in advance he was doing something to his disadvantage, paying money for a period when he was not insured at all."

An exhaustive note on the temporary insurance afforded by the binding receipt also appears in 2 *A.L.R.* 2d 943.

CALIFORNIA INSURANCE CODE, SECTION 10115.

The above code section requires insurance coverage to begin "on the date the application was signed by the applicant" if, as in the case at bar, "a payment is made equal to the full first premium at the time an application for life insurance . . . is signed by the applicant and . . . the applicant received at that time a receipt for said payment on a form prepared by the

insurer" provided, as in the case at bar, the insurer "approves the application for the issuance by it of a policy of life insurance on the plan and for the class of risk and amount of insurance applied for . . .". This retroactive coverage begins "on the date the application was signed by the applicant" even though the applicant made a special request in the application to date the policy at a future date.

It was established law in California before the enactment of the Insurance Code provision that, if an applicant was accepted as a risk in accordance with his application and paid the full first premium and died after a date specially requested by him for the policy to take effect but before the policy was issued and delivered, the beneficiary was entitled to recover on the policy even though the particular document had not been physically issued and delivered. To give any meaning to the statutory language making the policy effective as of application date, it is necessary to hold that it means what it says; that is, that insurance becomes effective "on the date the application was signed by the applicant". The retroactive feature of the coverage would be particularly significant when applied to the commencement of the period of incontestability or, as in the case at bar, to the commencement of the two-year suicide period.

December 31, 1956.

Respectfully submitted,

NEIL CUNNINGHAM,

C. W. RICKETTS,

Attorneys for Appellant.

No. 15147

United States
Court of Appeals
for the Ninth Circuit

GERTRUDE FLETCHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Southern Division.

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-20-56

AUG 22 1956

PATIL P. O'BRIEN, CLERK

No. 15147

United States
Court of Appeals
for the Ninth Circuit

GERTRUDE FLETCHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of.....	1
Certificate of Clerk.....	67
Docket Entries	66
Indictment	3
Judgment, Order and Commitment.....	15
Memorandum in Support of Order in Civil Contempt of Gertrude Fletcher.....	5
Minutes of the Court, April 17, 1956.....	18
Notice of Appeal.....	20
Statement of Points and Designation of Por- tions of Record on Appeal.....	69
Transcript of Proceedings, April 12, 1956.....	21
Transcript of Proceedings, April 17, 1956.....	41
Witnesses:	
Gordon, Walter L., Jr.	
—direct	53
Steward, Harry D.	
—direct	49

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WALTER L. GORDON, JR.,
4104 S. Central Avenue,
Los Angeles 11, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief, Criminal Division;

HARRY W. STEWARD,
THOMAS H. LUDLOW, JR.,
Assistants United States Attorney,
600 Federal Building,
Los Angeles 12, California.

In the United States District Court in and for the
Southern District of California, Southern Division

No. 25929-SD

January, 1956, Grand Jury, Southern Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN A. WILLIAMS,

Defendant.

INDICTMENT

The Grand Jury charges:

Count One

(U.S.C., Title 18, Sec. 545)

On or about November 20, 1955, in San Diego County, California, within the Southern Division of the Southern District of California, defendant John A. Williams, with intent to defraud, did knowingly and wilfully smuggle and clandestinely introduce into the United States from a foreign country, namely, Mexico, certain merchandise, that is to say, approximately 22 pounds, net weight, of bulk marihuana, which said merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely, Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

Count Two

(U.S.C., Title 18, Sec. 545)

On or about November 20, 1955, in San Diego County, California, within the Southern Division of the Southern District of California, defendant John A. Williams, did knowingly receive, conceal, and facilitate the transportation and concealment of certain merchandise, namely: approximately 22 pounds, net weight, of bulk marihuana, which said merchandise, as the defendant then and there well knew theretofore had been imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

Count Three

(U.S.C., Title 26, Sec. 4755)

On or about November 20, 1955, in San Diego County, California, within the Southern Division of the Southern District of California, defendant John A. Williams, being a person required to register and pay the special tax under the provisions of Sections 4751 to 4753, Title 26, United States Code, did unlawfully import approximately 22 pounds, net weight, of bulk marihuana, without having so registered and paid such tax.

A True Bill.

/s/ GEORGE P. WEST,

Foreman.

/s/ LAUGHLIN E. WATERS,

United States Attorney.

[Endorsed]: Filed April 12, 1956.

In the United States District Court in and for the
Southern District of California, Southern Division

In Re:

GERTRUDE FLETCHER

MEMORANDUM IN SUPPORT OF ORDER
IN CIVIL CONTEMPT OF GERTRUDE
FLETCHER

On March 29, 1956, Fletcher appeared as a witness before the Federal Grand Jury at San Diego, California. After being duly sworn, and while being questioned by the Assistant United States Attorney, she refused to answer certain questions on the Constitutional ground that her testimony might tend to incriminate her. The jury then adjourned to the Court of the Honorable Jacob Weinberger where after some hearing on the grounds of the privilege invoked, Fletcher was directed to answer the questions propounded. At the suggestion of Fletcher's attorney the Court queried Fletcher as to whether if returned to the Grand Jury room she would then answer the question. Fletcher replied at this time that she would continue to resist the questions on the stated grounds. The Government now seeks an Order of Civil Contempt against her.

Contempts are of two types, criminal and civil. Prior to 1948 the provisions of the Code relating to civil and criminal contempts were separate. Thus, under Judicial Code, Sec. 268, 28 USCA 385, in

force prior to the new criminal rules of 1948, it was provided:

“The said courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

“R. S. No. 725, March 3, 1911, C231 No. 268, 36 Stat. 1163.”

This section was repealed by act of June 25, 1948, C646 No. 39, 62 Stat. 992, and incorporated in part in Section 459 of new Title 28 and in part by Section 401 of new Title 18.

Historical and Revision note following 459 (supra) states:

“The provision of Section 385 of Title 28, USC 1940 ed, giving to ‘all courts of the United States’ power to impose and administer all necessary oaths is the only part of such section in this title. The remainder is incorporated in Section 401 of revised Title 18, Crimes and Criminal Procedure.”

And in the historical note following Section 401 it is stated:

“* * * Section 385 conferred two powers. The first part authorizing courts of the United States to impose and administer oaths will remain in said Title 28. The second part relating to contempt of court constitutes this section.”

Section 401, Title 28, U.S.C., alluded to above, provides:

“A court of the United States shall have power to punish by fine or imprisonment at its discretion such contempt of its authority and none other, as——

1. Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
2. Misbehavior of any of its officers in their official transactions;
3. Disobedience or resistance to its lawful writ, process, order, rule, decree or command.”

It is important to keep in mind that the judicial sanction sought to be here invoked against Fletcher is civil and not criminal contempt. The courts have amply distinguished between the respective functions served by the two forms. Thus sentences for criminal contempt are primitive in their nature and are imposed for the purpose of vindicating the authority of the Court.

United States v. United Mine Workers of
America (1947) 330 U. S. 258, 302

Gompers v. Bucks Stove & Range Co. (1911),
221 U. S. 418, 441.

Judicial sanctions in civil contempt are twofold:
(a) to compensate the complainant for losses sus-
tained and/or (b) to coerce the contumner into com-
pliance with the Court's order.

United States v. United Mine Workers
(Supra) 304

Gompers v. Bucks Stove & Range Co.
(Supra) 448, 449.

Civil contempt is a sanction to enforce compliance
with an order of the Court.

Sauber v. Whetstone
(7th Cir. 1952) 199 F2 520.

While a criminal contempt proceeding is one for
punishment of alleged contempt, as an offense by
fine and imprisonment, one or both and expiation is
to the public as for a criminal offense.

In re Manufacturers Trading Corp. (1952) 6th
Cir. 194 F2 948.

A civil contempt proceeding is in the nature of a
proceeding for enforcement of some duty and is
essentially a remedy for coercing a person to do the
thing required.

Ibid.

See also :

U. S. v. International Union UMW
(1951) 190 F2 865

Boylan v. Detrio
(1951) 187 F2 375

Tobin v. Piolet
(1951) 7th Cir. 186 F2 886

Juneau Spruce Corp. v. I.L.W.U.
(1955) 131 F. Supp. 866 (D. C. Hawaii)

U. S. v. Yates
(1952) 107 F. Supp. 412 D. C. Cal.

In Boylan v. Detrio (1951) 7th Cir. 186 F2 886
(supra), the Court stated :

“Civil contempt proceedings are remedial and coercive, not punitive, in their nature, they look only to the future. They are not instituted as punishment for past offenses, but to compel obedience to the orders and decrees of the Court made for the benefit not of public justice but of parties to the litigation to compensate them for losses caused by defendant’s disobedience of earlier orders and decrees made for their benefit * * *”

“* * * A civil contempt exists only where there is a disobedience of Court orders to the damage of the other party and the punishment is by imprisonment to coerce the performance of an affirmative act or by the imposition of a fine to

compensate the injured party for actual loss or damage suffered because of the disobedience of an order or decree of the Court made for his benefit." (Emphasis added.)

See also on the coercive aspect of civil contempt:

Lamb v. Cramer

285 U. S. 217, 221

Michaelson v. U. S.

266 U. S. 42, 66

Gompers v. Bucks Stove & Range Co.

(supra).

In McComb v. Jacksonville Paper Co. (1948) 336 U. S. 187 at 193, the Court states that:

"The measure of the Court's power in civil contempt proceedings is determined by the requirements of full remedial relief."

Examples given are production of books, Penfield Co. v. Securities Exchange Commission, 330 U. S. 585, and payment of money, Gompers v. Bucks Stove & Range Co. (supra).

The interest of the Government in this proceeding is to secure Fletcher's answers to the propounded questions. It is best served by the instant proceeding in civil contempt to coerce the desired answers. The Government has at this time no desire to punish Fletcher, merely to compel her obedience to order of Court.

Turning to the power of the Court to punish for failure to answer questions before the grand jury,

it is established that the power of the Court to punish for contempts extends to Grand jury proceedings.

O'Connell v. United States

(1930) 2d Cir. 40 F2 201

Elwell v. United States

7th Cir. 275 Fed 775

United States v. Caton

(1803) 25 Fed. Cas. No. 14758

As stated by the recent case of Carlson v. United States (1954):

“The Grand Jury is an arm of the Court; and no doubt there may be instances of misbehavior in the Grand Jury room that constitute a completed offense of criminal contempt of Court because committed in the ‘presence’ of the Court within that broader meaning of 18 USC 401.”

(Citing many cases.)

This case goes on to state that mere declination of the witness in good faith, albeit erroneously, to answer a question before the Grand Jury does not constitute a contempt any more than a similar refusal would in Open Court as further stated:

“The claim of privilege calls upon the judge to make a ruling whether the privilege was available in the circumstances presented; and if the judge thinks not, then he instructs the witness to answer * * * A fortiori, the same

must be true where a witness before a Grand Jury erroneously but in good faith claims his privilege * * *”

“* * * The Grand Jury in that event, if it desires to pursue the matter further, must call on the assistance of the Court to make a ruling whether the privilege is available and to instruct the witness to go back to the jury room and answer the question if the ruling is made that the privilege was improperly claimed.”

Here the proceeding above mentioned has been scrupulously carried out. Fletcher was taken from the Grand Jury room to the courtroom, there examined by the Court as to the availability of the alleged privilege, and upon the conclusion by the Court that the asserted privilege was not available to her, Fletcher was ordered to answer the questions. This, in the physical presence of the Court, she refused to do, thus creating a contempt in the very presence of the Court.

The procedure to be followed in the prosecution of criminal contempts is set out in Rule 42 of the Federal Rules of Criminal Procedure. Subsection (a) of this rule provides for a summary procedure to be followed where the complained of contempt is committed in the presence of the Court. The procedure in cases of civil contempt is not so clearly defined. In *Phillipe v. Window Glass Cutters League of America* (1951) D. C. Ark. 99 Fed. Supp. 369, a patent case, the Court dealt extensively with

contempts both civil and criminal and the procedures followed. There it was suggested that some form of accusation be filed which conformed to the requirements of Rule 8 F.R.C.P. that defendant be permitted to answer, and that a hearing be held. However true this may be for civil contempts committed outside the presence of the Court, where, as here, the civil contempt was committed in the presence of the Court, the civil contumner can ask for no greater protection than the criminal contumner would have in a like situation.

Rule 42(a) provides in this respect:

“A criminal contempt may be punished summarily if the Judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the Judge and entered of record.”

This summary procedure was in fact followed under similar circumstances by the District Court for the Southern District of California, Central Division, Honorable Peirson Hall, Judge in the case of *United States v. Kasinowitz*, 8791-PH later reversed on the grounds that the Fifth Amendment was properly raised *Kasinowitz v. United States* (1950) 9th Cir., 181 F(2d) 632. In that case Kasinowitz refused before the Grand Jury to answer certain questions propounded relating to the identity of certain Communist leaders. The grounds as-

serted for the refusal was, as in the instant case, that of the Fifth Amendment—that the testimony might tend to incriminate him. The Grand Jury returned him to Court where Judge heard argument of counsel for the witness and the Government and then overruled the objections to the answering of the questions. Kasinowitz returned to the Grand Jury and again refused to answer the questions upon the stated ground. The Grand Jury so reported to the Court. Judge Hall after hearing further argument at that time found Kasinowitz in civil contempt and ordered him committed to the custody of the Marshal until he returned to the Grand Jury and answered the questions ordered by the Court.

The situations being closely similar it is submitted that this honorable Court may deal with Fletcher in a similar manner.

In the light of the premises it should once more be stressed that at this time the Government seeks not to punish Fletcher with a sentence and a fine for criminal contempt but seeks solely to have this honorable Court exercise its coercive power in civil contempt to commit Fletcher until such time as she returns to the Grand Jury and answers the questions ordered by the Court to be answered or until further order of this honorable Court.

In Re MeeKley (1943) 13 F(2d) 310.

As to whether the Court properly ordered Fletcher to answer.

The Ninth Circuit has held that whether the questions asked were in fact incriminating so as to warrant invocation of the Fifth Amendment protection is a question addressed to the discretion of the trial Court and in absence of an abuse thereof such determination will not be overturned. *Miller v. United States* (1938) 9th, 95 F(2d) 492.

It is, of course, established that the Fifth Amendment is a personal right and an attempt to invoke it to shield third persons may be the basis for contempt. *United States v. Yates* (1952) D. C. Cal. 107 F. Supp. 412.

[Endorsed]: Filed April 17, 1956.

In the United States District Court in and for the
Southern District of California, Southern Division

No. 1885-SD-W Civil

IN RE GERTRUDE FLETCHER

JUDGMENT, ORDER AND COMMITMENT
IN CIVIL CONTEMPT

This matter came on to be heard in Open Court this 29th day of March, 1956, upon complaint of a duly impaneled and constituted Grand Jury, January, 1956, term, present in Court, in the presence of the witness, Gertrude Fletcher, and her counsel, Walter Gordon, and present as attorney for the Government, Laughlin E. Waters, United States

Attorney, by Harry D. Steward, Assistant United States Attorney, and that said witness appeared before said Grand Jury on this date and after being duly sworn was asked questions to which she gave answers as follows:

Q. Did you accompany your son, John Arthur Williams, to Tijuana, Mexico, on November the 20th—— A. I refuse to answer——

Q. Wait until I finish the question, please. On November the 20th or 21st, 1955?

A. I refuse to answer on the "tution" ground that my testimony may incriminate me.

* * *

Q. Do you remember, or did you see Thomas on November 20, 1955?

A. I refuse to answer on the same ground, constitutional ground—on the constitution that ground that my testimony might incriminate me.

Q. Think carefully, the only time that you saw Thomas and your son together was together in Los Angeles and that was on two occasions, is that right? A. Yes.

Q. How about over here in the city jail in San Diego? A. I refuse to answer.

Q. Did your son and you visit Thomas in the city jail?

A. I refuse to answer on the same ground. (Witness apparently referring to earlier claims of privilege under the Constitution.)

The Court, after hearing evidence and argument of counsel for the witness and the Government on the matter of how the answers to said questions would incriminate or tend to incriminate said Gertrude Fletcher, overruled the objection to the answering of said questions by said witness and stated that it was the present opinion of the Court that the privilege attempted to be invoked was not properly invoked and the witness was ordered to go back to the Grand Jury room and answer said questions. At that time counsel for the witness then indicated that the witness would refuse to answer the questions before the Grand Jury although ordered to do so by the Court. Whereupon, the Court then and there asked the witness as follows: "Do you now refuse to answer those questions by going back to the Grand Jury room for that purpose?" to which the witness replied, "I refuse to testify on the Constitutional grounds that my testimony would incriminate me."

The Court, thereupon, after hearing further argument of counsel for both the witness and the Government adjourned until April 17, 1956, to enable counsel for the witness to propose additional evidence and argument.

On April 17, 1956, the Court reconvened and heard additional evidence and arguments of counsel for witness Fletcher and the Government, and being fully advised in the premises finds that said witness is in civil contempt of this Court in that said Gertrude Fletcher did wilfully disobey and resist a lawful order of this Court, to wit, the order

hereinabove set out to answer the aforesaid questions.

It Is Therefore Ordered, Adjudged and Decreed that said witness Gertrude Fletcher be committed to the custody of the U. S. Marshal and by him held until said witness returns to said Grand Jury and answers the said questions ordered by said Court to be answered as hereinabove set forth or until further order of this Court.

It Is Further Ordered that the clerk deliver a certified copy of this Judgment and Commitment to the U. S. Marshal or other qualified officer and that the copy serve as a commitment of the defendant.

Dated this 17th day of April, 1956.

/s/ JACOB WEINBERGER,
United States District
Court Judge.

[Endorsed]: Filed April 17, 1956.

Docketed and entered April 19, 1956.

MINUTES OF THE COURT

April 17, 1956

Present: Hon. Jacob Weinberger, District Judge.

Counsel for Plaintiff.

Counsel for Witness.

Witness Gertrude Fletcher.

Proceedings:

Further hearing on motion of U. S. Attorney that witness be found in contempt and committed to the custody of the U. S. Marshal.

Attorney Steward makes statement re subject matter of the Grand Jury investigation.

On motion of Attorney Gordon, Harry D. Steward is called, sworn, and testifies on examination by Attorney Gordon for respondent witness.

On own request, Walter L. Gordon is called, sworn, and testifies on behalf of the respondent witness.

At 3:05 p.m., and recess is declared until 4:30 p.m., and at 4:45 p.m., Court reconvenes herein, appearing as before.

Both sides rest.

The Court finds the defendant in civil contempt, and It Is Ordered that the defendant is committed to the custody of the U. S. Marshal until the witness returns to the Grand Jury and answers questions ordered by the Court, or until further order of the Court. Witness does not offer to answer questions.

The Court signs judgment, order, and commitment in civil contempt and Orders same filed and entered, to wit: (See judgment.)

Attorney Gordon files notice of appeal from said order and moves to fix bail on appeal at \$500.00.

Attorney Ludlow argues in opposition to motion. It Is Ordered said motion to fix bail is denied.

At 5:00 p.m., a recess is declared by the Court.

JOHN A. CHILDRESS,
Clerk.

By /s/ E. M. ENSTROM, JR.,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Gertrude
Fletcher, 131 East Century Boulevard, Los
Angeles, California;

Name and Address of Appellant's Attorney: Wal-
ter L. Gordon, Jr., 4104 South Central Avenue,
Los Angeles, California;

Offense: Contempt of Court;

Date of Judgment: April 17, 1956;

Sentence:

I, the above-named appellant, hereby appeal to
the United States Court of Appeals for the Ninth
Circuit from the Judgment above mentioned on the
grounds set forth below.

Dated: April 17, 1956.

/s/ GERTRUDE FLETCHER,
Appellant.

/s/ WALTER L. GORDON, JR.,
Attorney for Appellant.

Grounds of Appeal

That said sentence and judgment are in violation of Appellant's Constitutional rights under the Fifth Amendment of the United States Constitution against self-incrimination.

[Endorsed]: Filed April 17, 1956.

[Endorsed]: Filed April 19, 1956.

In the District Court of the United States, Southern District of California, Southern Division
No. 1885-SD-W

Before: The Honorable Jacob Weinberger,
Judge Presiding.

In Re

GERTRUDE FLETCHER

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

LAUGHLIN E. WATERS,
United States Attorney, By
HARRY D. STEWARD,
Assistant United States Attorney
in Charge of San Diego Office,
On Behalf of the Plaintiff.

WALTER L. GORDON, JR.,
Attorney at Law,
On Behalf of the Witness,
Gertrude Fletcher.

At 5:00 p.m., a recess is declared by the Court.

JOHN A. CHILDRESS,
Clerk.

By /s/ E. M. ENSTROM, JR.,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Gertrude
Fletcher, 131 East Century Boulevard, Los
Angeles, California;

Name and Address of Appellant's Attorney: Wal-
ter L. Gordon, Jr., 4104 South Central Avenue,
Los Angeles, California;

Offense: Contempt of Court;

Date of Judgment: April 17, 1956;

Sentence:

I, the above-named appellant, hereby appeal to
the United States Court of Appeals for the Ninth
Circuit from the Judgment above mentioned on the
grounds set forth below.

Dated: April 17, 1956.

/s/ GERTRUDE FLETCHER,
Appellant.

/s/ WALTER L. GORDON, JR.,
Attorney for Appellant.

Grounds of Appeal

That said sentence and judgment are in violation of Appellant's Constitutional rights under the Fifth Amendment of the United States Constitution against self-incrimination.

[Endorsed]: Filed April 17, 1956.

[Endorsed]: Filed April 19, 1956.

In the District Court of the United States, Southern District of California, Southern Division
No. 1885-SD-W

Before: The Honorable Jacob Weinberger,
Judge Presiding.

In Re

GERTRUDE FLETCHER

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

LAUGHLIN E. WATERS,
United States Attorney, By
HARRY D. STEWARD,
Assistant United States Attorney
in Charge of San Diego Office,
On Behalf of the Plaintiff.

WALTER L. GORDON, JR.,
Attorney at Law,
On Behalf of the Witness,
Gertrude Fletcher.

At 5:00 p.m., a recess is declared by the Court.

JOHN A. CHILDRESS,
Clerk.

By /s/ E. M. ENSTROM, JR.,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Gertrude
Fletcher, 131 East Century Boulevard, Los
Angeles, California;

Name and Address of Appellant's Attorney: Wal-
ter L. Gordon, Jr., 4104 South Central Avenue,
Los Angeles, California;

Offense: Contempt of Court;

Date of Judgment: April 17, 1956;

Sentence:

I, the above-named appellant, hereby appeal to
the United States Court of Appeals for the Ninth
Circuit from the Judgment above mentioned on the
grounds set forth below.

Dated: April 17, 1956.

/s/ GERTRUDE FLETCHER,
Appellant.

/s/ WALTER L. GORDON, JR.,
Attorney for Appellant.

Grounds of Appeal

That said sentence and judgment are in violation of Appellant's Constitutional rights under the Fifth Amendment of the United States Constitution against self-incrimination.

[Endorsed]: Filed April 17, 1956.

[Endorsed]: Filed April 19, 1956.

In the District Court of the United States, Southern District of California, Southern Division
No. 1885-SD-W

Before: The Honorable Jacob Weinberger,
Judge Presiding.

In Re

GERTRUDE FLETCHER

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

LAUGHLIN E. WATERS,

United States Attorney, By

HARRY D. STEWARD,

Assistant United States Attorney

in Charge of San Diego Office,

On Behalf of the Plaintiff.

WALTER L. GORDON, JR.,

Attorney at Law,

On Behalf of the Witness,

Gertrude Fletcher.

Thursday, April 12, 1956—2:10 P.M.

The Clerk: Your Honor, I have not called the roll of the Grand Jury.

(Roll Call.)

The Clerk: A quorum is present, your Honor.

Mr. Steward: Now, if the Court please, this is in the matter of the investigation——

The Court: Just a moment, is everyone present concerned in this matter?

The Clerk: I was going to call it, your Honor.

The Court: Yes. Proceed.

The Clerk: Into the Grand Jury indictment of John Arthur Williams. The Grand Jury is present and convening, your Honor. I think counsel is here, is that right?

Mr. Steward: Right.

The Clerk: And the witness, Gertrude Fletcher, is that right?

Mr. Gordon: She is here, too, yes.

Mr. Steward: If the Court please, this matter was before the Grand Jury two weeks ago on March 29, 1956, at which time, it was continued to this date and the witness, Gertrude Fletcher, was instructed to return. If the Court please, speaking on behalf of the Grand Jury, the witness, Gertrude Fletcher, strike that. [1*]

The Grand Jury was duly convened on March 29, 1956. The witness, Gertrude Fletcher, was subpoenaed to appear before that body. She appeared,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

was duly sworn before the Grand Jury, on March 29, 1956, and certain questions were propounded to her. She failed and refused to answer certain of the questions which are are follows:

And if I may, I will state, her questions and answers are of the three series pertaining to the same substance and answers hereto. One——

The Court: Are you——

The Clerk: Mr. Gordon, will you please state your name for us for the record?

Mr. Gordon: Walter L. Gordon.

Mr. Steward: Your Honor, in the interest of time, I might file with the clerk a memorandum for the Court setting forth the specific questions at this time and I also will give counsel a copy.

Mr. Gordon: Thank you very much.

Mr. Steward: The first question was:

“Question: Did you accompany your son, John Arthur Williams, to Tijuana, Mexico, on November the 20th?

“Answer: I refuse to answer——

“Question: Wait until I finish the question, please. On November the 20th or 21st, 1955?

“Answer: I refuse to answer on the ‘tution’ ground [2] that my testimony may incriminate me.”

The second question of the series of questions:

“Question: Do you remember, or did you see Thomas on November 20, 1955?

“Answer: I refuse to answer on the same ground, constitutional ground—on the constitution

that ground that my testimony might incriminate me.”

And then the third question of the series of questions pertaining to the same substance:

“Question: Think carefully, the only time that you saw Thomas and your son together was together in Los Angeles and that was on two occasions, is that right?

“Answer: Yes.

“Question: How about over here in the city jail in San Diego?

“Answer: I refuse to answer.

“Question: Did your son and you visit Thomas in the city jail?

“Answer: I refuse to answer on the same ground.”

Now, the same ground there, if the Court please, the witness is probably referring to the earlier claims of privilege under the provisions of the Constitution. Now, is that correct, Mr. Foreman, as I have stated it, so far?

Foreman of the Jury: Yes.

Mr. Steward: It is the position of this office, if [3] the court please, and the Grand Jury, that the witness could not justifiably rely upon any so-called claim of privilege against self-incrimination as set forth in the Constitution. It is our position that she is making a claim in bad faith and, in truth and in fact, there is no chance that her answers to those questions would tend to incriminate her.

Now, if the Court would like, I will make a brief statement as to where the investigation is going, so that the Court may properly apprise the situation as it pertains to this witness.

The Court: First, will you read the statute under which the proceeding is held? Now, do you have the statute, for the benefit of the reporter?

Mr. Steward: You are referring now to the statute?

The Court: Under which you are seeking relief at the present time.

Mr. Steward: That is under the inherent power of the Court, if the Court please. The Grand Jury is the Court's jury and she has refused.

The Court: I understand. Can you refer to the statute and read it so that the witness might know what the statute is which governs this proceeding.

Mr. Steward: Well, your Honor, we are in the process of [4] seeking, at this time, a contempt of court citation for civil contempt as distinguished from criminal contempt. If the Court had in mind of reading the criminal provisions, of course, we will be glad to do so, but we are more in a nature of wanting answers to our questions rather than incarceration for some period of time.

The Court: Very well. Now, the questions and the answers that you have just been reading. You have set them out, have you, from the reporter's notes or transcript?

Mr. Steward: Yes, your Honor. The foreman here has checked the official court reporter's notes

as against the exhibits which I have placed in the memorandum, is that true, sir?

The Court: I will ask counsel for the witness. Is that a correct, in your opinion, a correct transcript of the questions and answers?

Mr. Gordon: You have heard the questions asked you, and are they about the same that were asked?

The Witness: Yes, they were.

The Court: Will you stipulate that those are the questions and answers asked heretofore?

Mr. Gordon: I am satisfied they were, your Honor. On Counsel's representation and they were, I am willing to stipulate.

Mr. Steward: If there is any doubt, I have the court reporter. [5]

The Court: We have the reporter here.

Mr. Steward: Mr. Spencer is present in court. If there is any doubt I would be glad to call him.

Mr. Gordon: There is no doubt, your Honor.

The Court: Just a moment. We will hear what Mr. Steward has to say. You may proceed.

Mr. Steward: I might ask counsel if there is any change in position.

Mr. Gordon: Pardon?

Mr. Steward: Any change in position?

Mr. Gordon: Only change in position as to the questions, "Where do you reside? Do you have any children?"

Mr. Steward: We are not asking for a contempt citation with respect to those.

Mr. Gordon: Anything about a trip to Tijuana,

she stands on the same ground and I think our position is—I was very elated to hear you have written several articles on Constitutional law, your Honor. They were discussed at Los Angeles. With reference to the other questions asked, I think they can be disposed of in two minutes. It is so elementary to me; that she has her rights. May I say this: The trip to Tijuana is the very essence of the crime they are inquiring about.

From what I understand, her son is accused in having aided in the transportation of the marihuana across the line. [6] That is, he didn't do it himself. He made an agreement, I understand, you are charging him with, and that also they have a witness who has testified that the mother accompanied the son on this trip from Los Angeles to Tijuana. They are going into whether or not she accompanied the son on the trip which would certainly lay her liable to prosecution also, if she did, and then also, they want to know something about the facts about the trip and if she were, in fact, along.

Such testimony would certainly incriminate her and I have a case that I know your Honor is familiar with. This Weisman case, I think, where they asked a man merely whether or not he knew of certain people in China. That is 111 Federal 2d, 260. Referring to Page 260:

“In order to entitle witness to refuse to answer questions under claim of privilege against self-incrimination, the witness is compelled to do no more than show that the answers would likely be dangerous to the witness.”

And for that reason, she respectfully still refuses to answer.

The Court: Let me ask the witness. I will ask of the witness, first, let us have her name in the record. What is your name?

The Witness: Gertrude Fletcher.

The Court: Are you invoking this privilege in your own behalf or are you doing it so as to protect your son? [7]

The Witness: In my own behalf.

The Court: In your own behalf. Do you feel that you are incriminating yourself by answering those questions that have been referred to by the United States Attorney at this time or do you feel that it merely endangers the position of your son?

The Witness: Would you repeat that again, please? I didn't get it so good, your Honor.

Mr. Gordon: I will be glad to ask her.

The Court: Well, we will get her answer.

(Pending question read by reporter.)

The Witness: I feel I would be incriminating myself.

Mr. Steward: May I be heard again, your Honor?

The Court: Yes, go right ahead. You may be seated. (Indicating the witness.)

Mr. Gordon: Thank you.

Mr. Steward: We have no quarrel with the position, if the Court please, that, one, in fact, they tend to be incriminating questions. It is the position of the Grand Jury and our position, that on

the facts of this case, that such privilege is not availing because the witness, in fact, will not be incriminated by the answers.

Very briefly, if the Court please, the Grand Jury is investigating a violation by John A. Williams, occurring on or about November 21st of 1955. We intend to develop—that on or about November 20th, 1955, we intend to develop, [8] that one, John Benjamin Thomas, left the city of Los Angeles on or about that date for Tijuana, Mexico. We intend to show that he was in one car which I will refer to as an older car. On the same date and approximately the same time, John A. Williams drove an Oldsmobile vehicle from Los Angeles, likewise, to Tijuana. We intend to show that at this time that Williams drove the Oldsmobile, which I will refer to as the new car, for the purposes of distinction here, at the time he drove that car down to Mexico, that the witness, Gertrude Fletcher, was in the vehicle.

We would show, if the Court please, that the old car was parked by Thomas in Tijuana and the new car was parked by Williams nearby. We would show that Williams and another person then got out of the new car, went over to the old car and got in the old car, at which time Thomas left the old car.

We would show that Williams and the other person left, were gone for some time, several hours. During the time they were gone, the witness, Gertrude Fletcher, remained in the new car, together with Thomas. John Williams returned in the old car. Williams got out of the old car, as did the

passenger, and Thomas got in the old car and proceeded across the border. The witness did not leave the new car to our knowledge in Tijuana and presumably drove back from Tijuana into the United States and on up to Los Angeles in the company of [9] John Williams and one or two others.

We intend to show, if the Court please, that there is no evidence, not one scintilla of evidence, showing the witness, Gertrude Fletcher, had any criminal liability for the particular transaction. I have overlooked one thing. After Thomas got back in the old car in Tijuana and drove back to the United States by himself, if the Court please, he was stopped at the customs inspection point at San Ysidro and under the hood of the old vehicle was found twenty-two pounds of marihuana.

Now, at no place, if the Court please, has the witness, Gertrude Fletcher, ever been in any such proximity of this marihuana except that it happened to be in another car. The only thing we want from her, Gertrude Fletcher, is the truth about whether or not she was in Tijuana when Williams and Thomas were there. That is all. This Grand Jury is not investigating any possible criminal violation of Gertrude Fletcher. The investigation is predicated solely upon John Williams. I can hardly make it any more emphatic than that.

If the Court please, mere suspicion unstated, in fact, to my mind, is not sufficient reason for a person to come forth and claim the privilege against self-incrimination. I know counsel is just dying to state at this time the reason that I stand up and

say that Gertrude Fletcher is not under investigation means nothing because I cannot grant [10] immunity. That is true. It is certainly the state of mind of this Assistant and I certainly think I speak for the Grand Jury, is that true?

Foreman of the Jury: Yes.

The Court: Just a moment.

Mr. Steward: Just one more thing. That is what the facts disclosed.

The Court: Now, specifically what questions have you left that you require an answer to?

Mr. Steward: Those which I simply stated at the time I previously started to address the court.

The Court: There are two questions—apparently, she is willing to answer those.

Mr. Steward: No, they are only for the purpose of showing her state of mind. The first question, "Where do you reside? I refuse, I refuse to answer," which I say shows the state of mind of the witness is bad faith insofar as the claim of self-incrimination is concerned. She is really trying to shield her son.

The questions I want answered would be set forth from line 19 of page one over to line 8 of page two of the Memorandum for the Court which I filed a few minutes ago.

The Court: Just read them again.

Mr. Steward (reading):

"Question: Did you accompany your son, John Arthur [11] Williams to Tijuana, Mexico, on November the 20th * * *"

There was an interruption.

“Answer: I refuse to answer.

“Question: Wait until I finish the question, please. On November the 20th or 21st, 1955?

“Answer: I refuse to answer on the ‘tution’ (t-u-t-i-o-n) ground that my testimony may incriminate me.”

That would be the first question, your Honor. It is really one single question. It is broken up because of the interruption by the witness.

The Court: Now, the next question.

Mr. Steward: Do you want to go through all of them?

The Court: Just those specific questions you require now.

Mr. Steward: All right, the next question:

“Question: Do you remember, or did you see Thomas on November 20, 1955?”

Mr. Steward: Then the answer she gave again was claiming privilege and then the third question and I have put one or two questions and answers. Proceeding then for the purposes of clarity:

“Question: Think carefully, the only time that you saw Thomas and your son together was together in Los Angeles and that was on two occasions, is that right?

“Answer: Yes. [12]

“Question: How about over here in the city jail in San Diego?

“Answer: I refuse to answer.

“Question: Did your son and you visit Thomas in the city jail?

“Answer: I refuse to answer on the same ground.”

Now, those are the questions, your Honor, and on a factual situation with respect to the last question, I would advise the Court, this is some time after November 20th of 1955, after the offense was committed, and the witness participates in the visit to the jail. It would be very innocuous, your Honor. It would have no criminal liability at all, but we want the testimony as to that particular visit.

The Court: In view of the statements made by the United States attorney, what is your answer, Mrs. Fletcher, at this time?

Mr. Gordon: She refuses to answer, your Honor, on the ground her testimony might tend to incriminate her and I would like to make a statement.

The Court: I would like to have her make that statement.

Mr. Gordon: Do you wish to answer those questions, the three questions as enumerated?

The Witness: I refuse to answer on the constitutional ground that my testimony may incriminate me.

The Court: That is all you have to say to the Court, [13] is that it?

Mr. Gordon: That is it, your Honor.

The Court: Now, what is it you want to say?

Mr. Gordon: I might state, if you will notice, that counsel has been very courteous and he has been very obliging and perhaps, in a way, he would like to grant immunity, but the privilege against self-incrimination is available to a witness before the Grand Jury even though no proceeding has

started or commenced against him. That is 142. That is, counsel, 142 U. S. 547.

In this instance, if your Honor please, I think counsel stated, he said, your Honor, that all we want to know is about this trip and there is no criminal violation as far as we know. Now, say this woman got on the stand and should reveal that she did take a trip and in eliciting questions from her, that they would elicit the fact that maybe she did have some criminal complexity, then probably I would be probably be advised by counsel that perhaps I should have stood on my privilege because this woman is in it now. This lady is standing on her privilege that the whole setup of any trip of Tijuana is in good faith, a violation of her constitutional rights and, therefore, she refuses to testify and she stands on that privilege.

Thank you very much for your indulgence.

Mr. Steward: If the Court please, at this time, I and [14] the foreman request that the witness be found in contempt of court and committed to the Marshal until such time she sees fit to answer the questions, generally asserting that she does not have justifiable good faith claim of self-incrimination. Is that true, Mr. Foreman?

Foreman of the Jury: That is correct.

The Court: In view of what has been proposed to the Court by the United States attorney, under the circumstances as they appear here, it is the present opinion of the Court that the privilege is not properly invoked and the witness is ordered to go back to the Grand Jury room and answer those questions at this time.

Mr. Gordon: Your Honor, is there any way that we can just save your Honor's time and—or if you would rather have her go back upstairs and refuse to answer and then come back down here? If the Court please, I think we would refuse to answer them right at this time in front of the Grand Jury.

The Court: Let her state what her position is.

Mr. Gordon: I understand, please——

Mr. Steward: Your Honor, before she makes that statement, I wonder if the court would inquire of the witness and her counsel, if there is anything else they want to say with respect to her privilege; if they have said everything they desire to say.

Mr. Gordon: I might say, I have never been classified [15] as a fortune teller and the whole basis of counsel's accusation against this woman is on the grounds he does not think she is in good faith so the burden is upon him to establish that she is not in good faith and I certainly think he has a very onerous burden in making this attempt to force this woman to answer these questions, which I think could not be sustained.

The Court: You were about to state?

Mr. Gordon: She would not answer the questions before the Grand Jury. As a matter of fact, I have advised her in this. She is in very much good faith, your Honor, and I would like to approach your Honor in chambers so that you can ascertain the matter of good faith. This is so elementary to me, that her position is based upon good

faith, your Honor, that I should not waste the time of the Court or in any Circuit Court. I think I can establish that. I do that in an offer of good faith to your Honor.

The Court: I shall ask her, do you or do you not refuse to answer those questions by going back to the Grand Jury room for that purpose?

The Witness: I refuse to testify on the constitutional ground, that my testimony would incriminate me.

The Court: Very well. Is there anything further, Mr. Steward?

Mr. Steward: Well, your Honor, I wonder, for the purpose [16] of the record, if the Court would instruct her to answer those particular questions we have shown she has previously refused to answer and instruct the witness to answer that question then before the Grand Jury and let her now refuse if she so desires.

The Court: She has already stated she refuses to go back to the Grand Jury room and answer the questions.

Mr. Gordon: That is true.

The Court: The same questions stated a moment ago, read by the United States counsel.

Mr. Steward: I read several over and above three questions.

Mr. Gordon: Three questions.

Mr. Steward: First three, so long as there is no misunderstanding.

Mr. Gordon: There is no misunderstanding. Your Honor, before you make your finding, may

I present certain cases to you and I think the Weisman case, your Honor, is so very clear?

The Court: Well, I am glad the situation is clear to somebody. We have been studying this matter here some little time and we find considerable law on the subject matter.

Mr. Gordon: I am sorry to make that statement.

The Court: I am not criticizing you at all.

Mr. Gordon: My point is this, I have read so little law that is clear to me, because of the fact I have read so little—— [17]

The Court: I understand. I am inclined to adjudge her in contempt at this time, but I will continue the matter until—when do you want to continue it?

Mr. Steward: We are ready now, for that matter, so any time the court desires. The sooner the better as far as I am concerned, tomorrow?

The Court: Tomorrow, yes.

Mr. Gordon: Well, your Honor, as far as tomorrow is concerned, if you have already made your adjudication, you might as well just—we will waive time and you do what you are going to do now and then we will——

The Court: On Monday or Tuesday, rather, if you prefer to continue this until Tuesday, I will continue it until Tuesday.

Mr. Gordon: When you say continued to Tuesday, your Honor, will you allow us to submit any authorities Tuesday or are you just going to make a finding?

The Court: Well, I can't prevent you from giving me anything that is pertinent to the subject matter.

Mr. Gordon: I didn't know whether to come armed with any authorities or come armed with something that might help you out.

The Court: It appears to me now that she is in contempt of court and I am continuing this matter for a day or two. [17-a]

Mr. Gordon: Your Honor, are you aware of the particular charge in this case?

The Court: Yes. I sat through the trial in the case and I think I know what it is all about. The case was tried before a jury and I have in mind some of the happenings during the progress of that case.

Mr. Gordon: Yes, your Honor.

The Court: However, that is separate and apart from this proceeding.

Mr. Gordon: I think the charge in this case is one of—could you state the specific charge, counsel?

Mr. Steward: You mean under investigation?

Mr. Gordon: Yes.

Mr. Steward: It is a violation of Title 18, Section 545, in count 1, which is smuggling merchandise, in this case, approximately 22 pounds of marihuana. The second count would be title 18, 545, the concealing, facilitating the transportation of merchandise, likewise, marihuana. The third count would be one of the internal revenue counts.

Mr. Gordon: What count would that be?

Mr. Steward: Well, don't hold me too close to

this, Title 26, U.S.C. 2455. I am not positive of the importance. It is importing it without paying the tax.

Mr. Gordon: All right.

The Court: We are considering during this proceeding, [18] that the witness has had a hearing by the court to determine whether she is justified in claiming the privilege against self-incrimination, is that right?

Mr. Gordon: Yes, your Honor.

The Court: Before making a finding I would like to think the matter over for a day or two.

Mr. Gordon: Yes, your Honor.

The Court: And, of course, if, in the meantime, the witness desires to take any other action she has the opportunity of doing so.

Mr. Gordon: Thank you, your Honor.

The Court: Meaning, of course, that she may purge herself if she sees fit in answering the questions before that time.

Mr. Gordon: Yes, your Honor, and you want to continue it until what time?

The Court: When is it convenient?

Mr. Gordon: May I be excused for a moment?

The Court: And she may come prepared when we do reconvene to meet the situation such as it may be.

Mr. Gordon: Yes, your Honor.

The Court: We can't delay it too long, for the reason that——

Mr. Gordon: Tuesday is all right, your Honor.

The Court: Tuesday all right, Mr. Steward? [19]

Mr. Steward: Yes, your Honor, that will be fine.

The Court: Tuesday, what time, 2:00 o'clock?

Mr. Gordon: That will be fine with me. I might say it was raining very hard in Los Angeles. We had to catch a plane to come out here today.

Mr. Steward: Your Honor, I am sure the Grand Jury need not be present at that time, is that true? This is strictly a court matter?

The Court: Not unless, of course, there is a change in the status. That matter can be arranged. Very well, the matter is continued and the witness ordered to be here at that time.

Mr. Gordon: Your Honor, she is making these trips and I don't think she has received any expenses. Is there any way as a witness that she can be granted expense money?

Mr. Steward: That first trip, she was here under Grand Jury subpoena. She certainly is entitled to pay. If she will come into our office we will take that matter up.

The Court: You take that matter up with the United States attorney.

Mr. Gordon: Thank you, very much.

Mr. Steward: I believe that is all, your Honor. I think we can reconvene upstairs.

The Court: Is the Grand Jury ready to [20] report?

Foreman of the Jury: There is a little more business and we are ready, your Honor.

The Court: You may resume your deliberations.

(Conclusion of present hearing.) [21]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, this 5th day of May, A.D. 1956.

/s/ HELEN B. SALISBURY,
Official Reporter.

[Endorsed]: Filed May 7, 1956.

April 17, 1956—2:25 P.M.

Appearances:

LAUGHLIN E. WATERS,
United States Attorney, by
HARRY D. STEWARD,
Assistant United States Attorney in
Charge of San Diego Office, and
THOMAS H. LUDLOW,
Assistant United States Attorney,
On Behalf of the Plaintiff.

WALTER L. GORDON, JR.,

Attorney at Law,

On Behalf of the Witness, Gertrude
Fletcher.

The Clerk: We had a matter, your Honor, temporarily scheduled for 1:45. It was a setting. I don't believe the defendant is here at the moment. Do you want this other matter?

The Court: I think the marshal went upstairs with the prisoner.

The Clerk: Do you want this other matter called up at this time?

The Court: We will proceed with the matter before the court.

The Clerk: This is in the Matter of Gertrude Fletcher, further hearing on motion of the United States Attorney that witness be found in contempt and so forth.

Mr. Gordon: Ready for the defendant, your Honor.

Mr. Steward: The government is ready, your Honor.

The Clerk: The witness is present, I understand.

Mr. Gordon: Yes; come forward, Mrs. Fletcher.

The Court: Do you wish to present anything further?

Mr. Gordon: Yes, your Honor. May I have the privilege of calling the U. S. Attorney to the stand? Even by virtue of a stipulation I think we can reach—I don't want any error in the record with

reference to what the facts are in this case [1*] and——

Mr. Steward: Do you want me to make a statement insofar as the investigation is concerned?

Mr. Gordon: We know what your investigation has disclosed. These are the things that I know of and these are the things that my client is fearful of, your Honor.

The Court: We have no reason specifically why she did not answer the questions at the last hearing; merely, she stood on her constitutional rights as she claimed, without any explanation.

Mr. Gordon: I thought perhaps the revelation to you what the investigation had revealed—I tried to get it in the form of a stipulation—would reveal to you the nature of the investigation. If counsel would just make a stipulation of those facts——

Mr. Steward: I would be glad to state them and if you find them in error anywhere along the line you may correct me; otherwise, we will enter into a stipulation.

Mr. Gordon: All right.

The Court: I think she may be seated.

Mr. Steward: If the Court please——

Mr. Gordon: Do you want me to remain here, your Honor, or——

The Court: Well, suit yourself, either at the table or wherever you would like.

Mr. Steward: If the Court please, on December 7 of [2] 1955, a federal grand jury sitting in the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Southern District of California returned a three-count indictment against John Benjamin Thomas, being case Number 25,683-SD, and with counsel's permission I will refer to that case as the official court file and I will not proceed to read it into the record at this time.

The essence of that case, however, was that it charged that Thomas, on or about November 20 of 1955, in San Diego County, did, in Count 1, smuggle approximately 22 pounds of marihuana; in Count 2, that he concealed said 22 pounds of marihuana, and Count 3, that he did unlawfully import the said 22 pounds of marihuana without having paid the special tax.

Mr. Gordon: Right there may we pause and may a copy of the indictment be introduced into the record, please, your Honor?

The Court: Does that have any bearing?

Mr. Gordon: Yes, if the Court please, it calls for reference of a particular case.

The Court: Putting the indictment in the record—is that part of the record?

Mr. Gordon: I read it in other cases and they did it in all other cases. Maybe they did it with surplusage and I notice they did it and I didn't want to depart from precedence, your Honor. [3]

The Court: Any objection?

Mr. Steward: No objection, but I think what counsel is referring to is another indictment. Which one are you talking about?

Mr. Gordon: I am talking about the John Williams indictment.

Mr. Steward: That was not the one I am referring to. That was John Benjamin Thomas.

The Court: The Williams matter is now pending. The Thomas matter has been disposed of.

Mr. Gordon: That is right. That is right.

Mr. Steward: I mentioned the Thomas matter because the court heard that matter when it came on for trial before a jury and I know the court is aware of the evidence which was introduced at that time, thereafter, it appearing that John Williams was a party to the transaction in which John Benjamin Thomas was convicted.

The Court: That is, he was a witness called into the trial of the case.

Mr. Steward: He was a witness, your Honor, that was called to testify at the John Benjamin Thomas case. What I am now saying, though, that subsequent investigation disclosed the fact that Williams was one of the parties. So he and Thomas were the two parties that were involved in that particular 22 pounds of marihuana transaction. [4]

Mr. Gordon: And that he was a government witness, that is, Williams was a government witness, is that right, counsel?

Mr. Steward: He was called as a witness for the government.

Mr. Gordon: Right.

Mr. Steward: The evidence and subject matter of the present grand jury investigation, as I understand it, is that on or about the 20th of November of 1955, John Benjamin Thomas drove from Los Angeles to Tijuana, Mexico, in a vehicle owned by

John A. Williams. John A. Williams, in the company of one Ruth White and the witness, who is present before the court, Gertrude Fletcher, and one other person, drove a new vehicle, I can't recall what it was, a new Oldsmobile or something, from Los Angeles, likewise, to Tijuana.

The two vehicles, the one occupied by Thomas and the one occupied by Williams, parked near a building in Tijuana. Williams and Ruth White got out of the new car and went over to the old car where Thomas was seated. Thomas got out of the old car, at which time Williams and Ruth White got into the old car and drove away. Thomas went then to the new car and sat in the new car with the witness, Gertrude Fletcher, for a period of approximately an hour and a half, an hour or two hours, somewhere along in there; at which time Williams [5] and Ruth White returned in the old car, got out of the old car, and John Benjamin Thomas got into the old car. John Benjamin Thomas then proceeded directly from that point to the border at the port of entry, San Ysidro, California, at which time he was stopped. The old vehicle was searched and the 22 pounds of marihuana was found concealed therein.

We believe that Williams, Ruth White, the witness, Gertrude Fletcher, and one minor child proceeded, or at some period, proceeded from Tijuana back to Los Angeles, California.

Now, that in general, is the essence of the case pending against Williams and is the subject matter of the grand jury investigation.

I reiterate again, if I may, if the Court please, as I stated last Thursday, when the grand jury was here and my comments were, to my recollection, adopted by the foreman, the grand jury is not, repeating—is not investigating Gertrude Fletcher. We have no evidence tending to show that she is criminally a part of any transaction involving marihuana on November 20, 1955. The grand jury is interested in Gertrude Fletcher solely and simply as a witness. We desire to ascertain from her whether or not Williams was in Tijuana on November 20. No questions have been asked of her whether she knew of any marihuana being there. No questions like that are indicated because we have absolutely no evidence tending to show that she had any such knowledge. [6]

In other words, the most that could be said of our questions is, we are asking her to identify a participant in the transaction occurring in Mexico. That is all.

Mr. Gordon: May I say one other thing?

The Court: Merely as to her presence in Mexico at that time, in company with Williams, is that it?

Mr. Steward: That is correct. If I may, one other thing. Our second question or third question concerned whether or not she had seen or visited with her son, with John Benjamin Thomas, in the city jail at San Diego.

The Court: And that was after this occurrence?

Mr. Steward: After the occurrence.

Mr. Gordon: Would you repeat what you said, counsel, please?

Mr. Steward: Yes, if I may refer to our memorandum for the Court. Last Thursday, the third question set forth therein which reads as follows:

“Question: Did your son and you visit Thomas in the city jail?”

“Answer: I refuse to answer on that same ground.”

That, if the Court please, was after the commission of the offense. The only thing we want to interrogate that witness about is conversations had between Thomas and Williams. That is all. None of which, if the Court please, would tend to, in any manner, incriminate this witness. [7]

The Court: Is it material to the issue, the matter as to——

Mr. Steward: As to Williams, yes, your Honor. It would tend to show knowledge on Williams' part of the earlier transaction; not knowledge on the witness' part, just on Williams' part.

Mr. Gordon: If the Court please, I would like to call the U. S. Attorney as a witness just for two questions, just for two questions.

The Court: If he will submit.

Mr. Steward: Surely. I have nothing to hide.

Mr. Gordon: All right, will you take the stand, please?

HARRY D. STEWARD

called as a witness by counsel for the witness, Gertrude Fletcher, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gordon:

Mr. Steward: Would you mind if I take my file?

Mr. Gordon: It is not going to be that deep, counsel. I will probably want my file.

The Clerk: State your name for the record.

The Witness: Harry D. Steward, Assistant in charge of the United States Attorney's office, San Diego, California.

Q. Mr. Steward, you have been assisting the federal grand [8] jury here in the investigating of crimes in this locale?

A. In many instances, yes.

Q. And you are interested in ferreting out crime, no matter who it has been committed by, is that right?

A. That is my oath of office.

Q. You have no right to offer any immunity to any witness who should testify before this grand jury, is that right?

A. Of course, that is a legal opinion.

The Court: That is a question of law.

Mr. Gordon: You have not offered Mrs. Fletcher any immunity, have you?

A. No, I have not.

Q. So when you state what your intentions are,

(Testimony of Harry D. Steward.)

you merely are basing that upon your state of mind as to how the evidence is at present, isn't that right? That is, what your intentions are towards Mrs. Fletcher when you state that you are not interested—— A. Well, no——

Q. ——in Mrs. Fletcher in any criminal prosecution? I will ask you, if her testimony did in fact reveal a crime, you would not hesitate to prosecute her, would you?

A. I certainly would. I certainly would.

Q. Would or wouldn't?

A. I would hesitate to prosecute.

Q. Even though a crime has been [9] committed?

A. Even though by some stretch of the imagination she is implicated and in view of the grand jury and my statements before this court, I would be extremely hesitant about prosecuting her for anything disclosed by her as the result of her testimony in aid of the government's investigation in this particular case.

Q. I will ask you this: If your evidence thus far, up to date, doesn't reveal that she did ride from Los Angeles, California, with her son, John Williams, on this occasion when Thomas was engaged in smuggling narcotics? A. You say——

Q. Does your evidence reveal she was riding with her son, John Williams, on this date when Thomas is accused of smuggling marihuana?

A. When I make the statement now, I am re-

(Testimony of Harry D. Steward.)

ferring to matters other than that—well, I won't qualify it at all.

The Court: You mean in the case that was tried or are you inquiring into what the evidence is now before the grand jury?

Mr. Gordon: Before the grand jury.

The Court: I don't know if he has to answer unless he wants to.

Mr. Gordon: That is a matter——

Mr. Steward: I believe I stated from the floor there was evidence showing that she had ridden in the Williams car [10] from Los Angeles to Tijuana on the same date that Thomas drove the other car to Tijuana.

Q. Now, it is the theory of your case that though Williams rode in another automobile he aided and abetted Thomas, isn't that right?

A. That would be true under Title 18, USC, Section 2.

Q. And you intend to question Mrs. Fletcher with reference to what happened in that automobile and what happened on that trip, isn't that right?

A. No, my question to her, as I recall from the transcript, was whether or not he drove it before anything was—whether she had gone to Tijuana in his car. I am sure that you appreciate, counsel, I am only in the grand jury room as a representative of the office.

Mr. Gordon: Surely.

Mr. Steward: As such I can tell you what I would expect to do and what I wouldn't expect to

(Testimony of Harry D. Steward.)

do. I asked the witness if she had seen Thomas on November the 20th of 1955, and I also asked her if she had accompanied her son, John Arthur Williams, to Tijuana on November the 20th, 1955.

Q. This November 20th, sir, is the date that Williams is alleged to have aided Thomas by accompanying Mrs. Fletcher in another automobile while Thomas was in another, still another automobile, isn't that right?

A. That would be true. [11]

Mr. Gordon: All right, no further questions, your Honor. Thank you, very much. Your Honor, I think the record is complete as far as we went and I think that I would like to take the stand and tell you that—may I take the stand, please?

The Court: Well, just wait until they get through consulting.

Mr. Gordon: I am sorry, your Honor.

The Court: Repeat your request.

Mr. Gordon: May I take the stand and testify? I understand the burden is upon us to show justification. I am trying to assume that burden. May I?

The Court: Very well.

WALTER L. GORDON, JR.

having been first duly sworn, testifies as follows:

The Clerk: Be seated, please, and state your name for the record.

Mr. Gordon: My name is Walter Gordon. I am a duly licensed attorney at law and I am licensed to practice in this court. I have been retained by Mrs. Gertrude Fletcher and she has presented her problems to me with reference to this testimony and after hearing the things that she has told me, I have advised her not to testify in answer to the questions propounded to her by a representative of the grand jury.

Mr. Steward: Now, may I interpose an objection and a [12] motion to strike, if the Court please, on the grounds that the opinion of the attorney has no place in a case such as this. It is the state of mind of the witness, not the advice which she has been given by counsel and I am sure Mr. Gordon is in all good faith, but I don't think that statement should become a part of the record.

Mr. Gordon: This goes to the matter of good faith which counsel says my client is without. I am indicating that she is in good faith following her attorney's advice.

Mr. Steward: And on the further grounds it is the opinion and conclusion of the witness.

Mr. Gordon: May I say further, your Honor——

The Court: Just a moment.

Mr. Gordon: Yes, your Honor.

The Court: You have already stated your posi-

(Testimony of Walter L. Gordon, Jr.)

tion, or what her position is. She stated her position. That is what is important. You are an attorney at law and you are representing her and now she has stated heretofore——

Mr. Gordon: Yes, your Honor.

The Court: There is nothing you can add by stating your conclusions, your opinion.

Mr. Gordon: No, except——

The Court: Whatever rights she has here is given to her by the law regardless of any opinion you may have.

Mr. Gordon: May I answer that by saying her good faith [13] was challenged, your Honor, not that her legal position was questioned. Counsel questioned her good faith. Consequently, I have the right to testify as to her reason for receiving advice, going to the matter of her good faith.

Mr. Steward: Your Honor, the question is whether or not the privilege arises in this case. The advice of counsel on that question would have no bearing whatsoever and by the same token I am attacking the bad faith portion of this as it pertains on the question whether the privilege can properly be claimed in this case. I say then it can't. I say the witness is attempting to shield her son. She is not being incriminated and she would not tend to be incriminated by answering these questions.

Mr. Gordon: I move to strike counsel's remarks because one is as fair as the other.

The Court: Now, let's not go into that. The

(Testimony of Walter L. Gordon, Jr.)

question of good faith is not before the court. You are not being interrogated or questioned. You are an officer of this court.

Mr. Gordon: That is right.

The Court: And I take it every lawyer who appears here is in good faith, unless that good faith is in question, and it is not here.

Mr. Gordon: Yes, your Honor.

The Court: The motion is granted to strike the testimony of counsel. Anything further? [14]

Mr. Gordon: No, your Honor.

The Court: Do you have anything further, Mr. Steward?

Mr. Steward: Your Honor, I have here, if I may, a copy of a judgment order of commitment in a civil contempt which was signed by Judge Peirson M. Hall, sitting in this district, under factual situations that were similar to the one at bar. If the Court please, first, pursuant to finding this witness in contempt, civil contempt for her failure to obey the court's order, we would like to propose to the court a formal written judgment of order of commitment, reciting the factual situation as pertaining to this case, but if the court would like, I would be only too happy to file this other order of commitment in the case of Samuel H. Kasinowitz which was appealed to the Ninth Circuit Court of Appeal and the opinion shows no attack made on the form of the order and no other procedure followed therein.

The Court: Mr. Gordon, do you have anything

(Testimony of Walter L. Gordon, Jr.)

further to add insofar as Mrs. Fletcher is concerned? She is the one who is concerned here. She has already stated her position heretofore. Is there anything further you want to add?

Mr. Gordon: No, your Honor.

The Court: Her position is now as it was the other day, is that it?

Mr. Gordon: Yes, your Honor.

The Court: As to these three questions? [15]

Mr. Gordon: Yes, your Honor.

The Court: Let me see the form of your order, **Mr. Steward.**

Mr. Steward: Is this to be marked as an exhibit, your Honor?

The Court: No, it is an order in another case, isn't it?

Mr. Steward: It is a copy of an order in another case.

The Court: That won't help us here.

Mr. Steward: That concludes it, your Honor. We will draft the necessary order upon the Court's findings in this particular case. By way of clarification, your Honor, we stated last Thursday the matter, as far as we are concerned, is to be treated as a civil contempt in this Court, in that we are seeking to secure obedience to the Court's order. We are not seeking punitive measures at this time. The order which was handed to the clerk a moment ago was predicated upon the theory of civil contempt and the Ninth Circuit Court of Appeals so considered it.

(Testimony of Walter L. Gordon, Jr.)

Mr. Gordon: Your Honor, before you make a ruling, you remember I presented some authorities the last time. I would like to call your attention to those cases.

The Court: May I ask a question. I think it is in the record that there has been an indictment returned against Williams.

Mr. Gordon: Yes, your Honor. Maybe I am wrong. [16]

Mr. Steward: I mentioned the indictment against John Benjamin Thomas and I will now refer to the fact that last Thursday the Federal Grand Jury of San Diego returned a three-count indictment against John A. Williams, being indictment No. 25,929, and I might incorporate that indictment in my statements here by reference if that meets with counsel's approval.

Mr. Gordon: No objection.

The Court: Do you have further inquiry or investigation before the Grand Jury in relation to that case?

Mr. Steward: Yes, your Honor.

The Court: All right, Mr. Gordon, what is it you have there?

Mr. Gordon: I would like—your Honor, this is in a form. I presented U. S. authorities and I would like to show you one on all 4's, I think, with this case, your Honor.

The Court: What is the case?

Mr. Gordon: This is *ex parte* Crowe, 126, and this is a California Appellate Court case and I

(Testimony of Walter L. Gordon, Jr.)

know you probably have too much respect for those——

The Court: You can't presume anything.

Mr. Gordon: 126 California Appellate, 617. This is a book by Judge Fricke.

“Thus, where the answer to the question would tend to show the presence of the witness at the time and place that [17] the criminal offense was committed, he may properly refuse to answer it.”

And thus I just would like to——

The Court: That doesn't help me at all. I just can't rely on a text authority's version.

Mr. Gordon: Yes, your Honor.

Mr. Steward: Your Honor, I might state in that connection something I overlooked and that is the fact, that the evidence would show, that the vehicle in which John Benjamin Thomas was riding, which I have referred to as the old vehicle, was parked near the vehicle in which the witness, Gertrude Fletcher, was in, in Tijuana. That would be geographically, at least a mile, probably two miles, from the border, the port of entry at San Ysidro, California. The offense occurred at the border which would be two miles away from where Thomas and the witness Fletcher were together. This, if the Court please——

Mr. Gordon: May I ask something?

Mr. Steward: ——would be ascertaining the fact that at a time prior to the commission of the offense, a witness is able to identify a suspect.

Mr. Gordon: May I call your attention to the

(Testimony of Walter L. Gordon, Jr.)

fact that, counsel, first, the offense occurred. Certainly, we know that in aiding and abetting, one participant could remain in the City of Los Angeles and still be a conspirator and that when [18] he says the offense occurred, he must be thinking only of the attempted bringing of the marihuana across the line. If it please your Honor——

The Court: Well, of course, that is where, technically, the offense occurred, as to this transportation and smuggling into the United States, the transportation of marihuana. However, I can see your point if it involves a situation of that kind. Of course, he may be involved even though he is not in Mexico if it is that kind of a case.

Mr. Gordon: That is right.

The Court: Let me see the form of your order that you are working on in this case. We will have a recess for a few minutes. I am continuing the Fletcher matter until about 4:30.

Mr. Gordon: Yes, your Honor.

The Court: In the meantime, we will go ahead with the trial of the other case. Call in the jury.

(Thereupon, the Court resumes trial and recess is had in present proceeding.)

(Recess.)

4:30 P.M.

The Court: Now, then, you call the Fletcher matter.

The Clerk: This is in the matter of the applica-

tion of the Government to find the witness, Gertrude Fletcher, in contempt. I believe Mr. Gordon is here and the witness is here.

Mr. Gordon: Yes, your Honor. [19]

The Court: Is there anything further to present on either side?

Mr. Gordon: Not from the witness, your Honor.

Mr. Steward: We have filed, your Honor, a proposed judgment of order of commitment in the matter. I might state, I neglected to do earlier, I have given counsel a copy of this proposed order and I believe earlier today I gave him a copy of the memorandum for the Court in support of the order for civil contempt and I think for the purpose of the record, last Thursday, I also gave counsel a copy of the memorandum which was originally filed in this case and, I believe, by improper heading. The heading there was United States of America versus John Arthur Williams. I think probably the correct heading should have been: In re Gertrude Fletcher, as is presently set forth in the last two documents filed by the plaintiff.

The Court: There is nothing further then?

Mr. Gordon: No, your Honor.

The Court: It is now the judgment of the Court that you be committed to the custody of the United States Marshal and by him held until you, Gertrude Fletcher, return to the Grand Jury and answer the questions which have been propounded to you and which were ordered by the Court to be answered as heretofore recorded in the proceedings and as set out in the judgment and order that I am about

to sign or until the further order of the Court. [20]

Mr. Gordon: May I be heard now on another matter, if your Honor please?

The Court: Yes.

Mr. Gordon: I am very sincere in my representation of this defendant in this matter and I wish to stand on the grounds that we have already set forth. I would like, at this time, to file notice of appeal which I will present in duplicate to the clerk and ask that he respectfully present them to your Honor at this time. There is a place thereon provided for bail. I wish to urge upon your Honor to allow this defendant's application for bail.

I believe that the citations I have previously furnished you, though they did not convince your Honor, I believe that they certainly set up grounds for probable cause. I ask that you set a reasonable bail. This lady is a mother, married and is the mother of approximately four children. She owns her property in Los Angeles. Her husband is a railroad man and I feel a reasonable bail would be \$500.00 to answer all processes of the Court.

I do not feel, your Honor, as already indicated that earlier I mentioned the fact that I thought it was elementary and you indicated if I thought it was, I wouldn't have brought this up. I agree with you there and I ask that you set bail. Your Honor, I object to the substitution of counsel. I feel that to come in with an 18th player on a football team is a [21] little unfair here.

Mr. Steward: I can address the Court.

The Court: He is a member of the staff of the United States Attorney's office.

Mr. Gordon: I will waive any objection.

Mr. Steward: He has researched the point which will be given to the Appellate Court. I think it indicates what I want him to cover.

The Court: The Court will permit him to speak.

Mr. Ludlow: I would like to direct my remarks solely to the matter which has been raised, mainly, the matter of bail pending appeal. The woman is in civil contempt. The purpose is coercive. There is no crime charged here, no crime which would warrant the granting of bail. The sole purpose is coercing. The purpose loses efficacy if the bail is granted. We have a case, Howard versus the United States, which is an Eighth Circuit Court case and it involves a witness who gave false and evasive testimony before the Grand Jury. The Court stated at the conclusion of its opinion and I quote:

"Our conclusion is that a District Court has power to deal summarily with a witness before a Grand Jury who is guilty of a patent evasion equivalent to a refusal to give any material information. The judgment appealed from is affirmed. It is apparent that, to serve any useful purpose, it will have to be enforced promptly. Therefore, the order of this [22] Court admitting the appellant to bail is vacated, and mandate will issue forthwith."

This is Howard versus the United States, a 1950 case, Eighth Circuit, 182 Fed. 2d, page 908. I read from page 915.

We feel that that is applicable here. The purpose to be served by a commitment here is coercive and it will lose all force if bail is granted in this case. We might just as well throw it out the window. For that reason the Government resists any motion for bail at this time.

Mr. Gordon: Of course, I expected the Government to oppose it. Of course, it is coercive. It is very coercive. As a matter of fact, to state on one hand that it is strictly civil and then on the other hand to attach a jail sentence to it, naturally, immediately suggests that it is quasi-criminal in nature and we have all known for a long time that any contempt matter is a quasi-criminal matter.

As a matter of fact, in a contempt action the same privileges are invoked. That is, a witness does not even have to testify in a quasi-criminal matter. If counsel had wished to call my witness to the stand he couldn't have done so, because it is quasi-criminal and to state unequivocally that a person does not have the right to appeal to a higher court and thereby be granted bail, in spite of the fact, that there is a very close legal problem involved, is, I think, not only coercive, but I think that such a suggestion from [23] Government counsel is rather abusive and is one that certainly doesn't tend to give credit to the United States Government. I frankly fear that it is their policy in this Court to give every man a privilege, particularly, if he is in good faith to invoke all remedies of the law to protect his rights. And to summarily put him in jail and say this: you are going to stay in jail until

your case is heard whenever it is heard by the Circuit Court, is, in fact, to take away from him the very rights which we are granting him because certainly that is, in form, intimidation, and to threaten a man with jail saying you have no right to bail pending your being heard in the Circuit Court, is not to guarantee those rights which the Constitution gives, but you deprive him of his rights through intimidation.

The Court: Of course, you have the right, if you wish, to go before the Court of Appeals. That is your proper procedure. You have that right to go before the Court of Appeals, but I don't feel, under the circumstances, that I should go any further in the matter.

Mr. Gordon: It is a matter of delay when you go before the Circuit Court of Appeals because they naturally would like to have the transcript and the transcript, I imagine, will take some period of time unless we indulge in a stipulation and I imagine the Circuit Court of Appeals would not want to go up on the stipulation. They would like to have the actual [24] transcript. Those are formal things that we will have trouble with and I don't believe it is an imposition upon this Court, that a woman, such as the type of woman you have here, who stands on her constitutional guarantees, I don't think it is an imposition for you to grant bail in such a matter as this.

The Court: I don't think that I should, that I should act in the matter. I think if you feel that

you are entitled to bail, I think you might make your wants known to the Court of Appeals.

Mr. Gordon: All right. Thank you very much.

The Court: I will sign the order.

(Court adjourned.) [25]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, this 19th day of May, A.D. 1956.

/s/ HELEN B. SALISBURY,
Official Reporter.

[Endorsed]: Filed May 22, 1956. [26]

[Title of District Court and Cause.]

DOCKET ENTRIES

Filings—Proceedings

1956

Apr. 17—Ent. proc. on 4/12/56; Walter L. Gordon, atty. for wit. Fletcher, fld. memo of govt.; quorum G/J present in open court; ent. mot. govt. that deft. be found in contempt & committed cust. Mar. until she answers questions; ent. proc. on objs. wit. to questions; ent. finding that claim privilege not well taken & ent. ord. directing wit. ans. questions as propounded; ent. proc. wit. declines to ans. questions; ent. ord. cont. to 4/17/56, 2 p.m., for fur. hrg. Fld. on 4/17/56 mem. govt. in suppt. of ord. in civil contempt of Gertrude Fletcher. Ent. proc. on 4/17/56, finding deft. in civil contempt; ord. deft. committed cust. Mar. until she answers questions or fur. ord. Ct.; fld. jgmt., ord. & commitment in civil contempt. Fld. not. appeal witness (appellant) Fletcher from jgmt. herein; issd. abstr. to Mar. & U. S. Atty. Md. JS5.

Apr. 19—Dktd. & ent. judg. & ord. that Gertrude Fletcher be committed to custody of U. S. Mar. & held by him until sd. Fletcher ans. questions of Grand Jury as ordered by Court, or until fur. ord. this court, & ord.

for service, etc., htf. fld. 4/17/56. Not. attys. JS6.

Fld. copy applic. to Ct. Appeals respdt. Fletcher for bail & affid. in suppt.; fld. cc. ord. CA granting bail on appeal in sum of \$1000.00 to be approved by judge, or if not present, by U. S. Atty., or clerk.

Apr. 21—Ent. proc. & ord. (W) approving bail bd. on appeal of respdt. Fletcher; fld. bail bond on app. NACIC \$1000.00; issd. abstr. to Mar.

Apr. 25—Fld. desig. of Appellant, Fletcher of portions of Record to be contained in Record on Appeal.

May 7—Fld. reprints. trans. of proc. 4/12/56.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 20, inclusive, contain the original

Memorandum in Support of Order in Civil Contempt of Gertrude Fletcher;

Judgment, Order and Commitment in Civil Contempt.

Notice of Appeal;

Designation of Portions of Record on Appeal;

which, together with a full, true and correct copy of the Minutes of the Court had on April 17, 1956, and photostatic copy of Indictment in Case No. 25929-Criminal and Docket Entries; and two volumes of reporter's transcript of proceedings, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 24th day of May, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15147. United States Court of Appeals for the Ninth Circuit. Gertrude Fletcher, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed June 1, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15147

In Re

GERTRUDE FLETCHER

STATEMENT OF POINTS AND DESIGNA-
TION OF PORTIONS OF RECORD ON
APPEAL

Comes now the petitioner, Gertrude Fletcher in the above-entitled cause and for her statement of the points on which she intends to rely in her appeal to this Court, states as follows:

I.

That the questions propounded to said petitioner Gertrude Fletcher was in violation of the Fifth Amendment to the United States Constitution.

II.

That said questions and the answers thereto would have tended to incriminate said petitioner.

III.

That said petitioner is being deprived of her liberty without due process of law.

Said petitioner herein designates the following documents and portions of the record as being necessary for such consideration which she desires printed:

1. Notice of appeal.

2. Designation of portions of record on appeal.
3. Docket entries.
4. Indictment (Case No. 25929, Criminal).
5. Judgment, order and committment in civil contempt.
6. Memorandum in support of order in civil contempt.
7. Minutes of the Court had on April 17, 1956.
8. Names and addresses of attorneys.
9. Certificate of clerk.
10. Reporter's transcript of April 12, 1956.
11. Reporter's transcript of April 17, 1956.

Dated: June 13, 1956.

/s/ WALTER L. GORDON, JR.,
Attorney for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed June 14, 1956.

No. 15149

United States
Court of Appeals
for the Ninth Circuit

WIEN ALASKA AIRLINES, INC.,

Appellant,

vs.

SAMUEL SIMMONDS, Administrator of the
Estate of MARTHA SIMMONDS, Deceased,
for the Benefit of SAMUEL SIMMONDS and
the Children of the Deceased, Namely: LEONA
SIMMONDS, NELLIE SIMMONDS, DO-
REEN SIMMONDS, ELI SIMMONDS,
MARGARET SIMMONDS and ARNOLD
SIMMONDS,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Fourth Division.

FILED

AUG 22 1956

PAUL P. O'BRIEN, CLERK

No. 15149

**United States
Court of Appeals**
for the Ninth Circuit

WIEN ALASKA AIRLINES, INC.,

Appellant,

vs.

SAMUEL SIMMONDS, Administrator of the
Estate of MARTHA SIMMONDS, Deceased,
for the Benefit of SAMUEL SIMMONDS and
the Children of the Deceased, Namely: LEONA
SIMMONDS, NELLIE SIMMONDS, DO-
REEN SIMMONDS, ELI SIMMONDS,
MARGARET SIMMONDS and ARNOLD
SIMMONDS,

Appellee.

Transcript of Record

**Appeal from the District Court
for the District of Alaska,
Fourth Division.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Clerk Re Notice of Appeal	29
Answer to Amended Complaint	12
Attorneys, Names and Addresses of	1
Bond for Costs on Appeal	30
Certificate of Clerk	40
Complaint	3
Complaint, Amended	9
Court's Instructions	21
Defendant's Requested Instruction No. 1	20
Judgment	26
Memorandum Opinion	15
Motion to Amend Complaint	15
Motion Re Complaint, Defendant's	7
Notice of Appeal	29
Order on Defendant's Motion	8
Order Denying Motion for New Trial	28
Statement of Points on Appeal	32
Statement of Points on Appeal and Designa- tion of Contents of Record on Appeal	42
Stipulation Re Evidence	31
Transcript of Argument on Motion to Dismiss the Action	34
Transcript of Exceptions to Certain Instruc- tions to the Jury	38
Verdict	25

ATTORNEYS OF RECORD

ROBERT A. PARRISH,
544½ Second Avenue,
Fairbanks, Alaska,

Attorney for Plaintiff and Appellee.

CHARLES J. CLASBY,
1000 Polaris Building,
Fairbanks, Alaska,

Attorney for Defendant and Appellant.

In the District Court for the Territory of Alaska,
Fourth Division
No. 7524

SAMUEL SIMMONDS, Administrator of the
Estate of Martha Simmonds, Deceased, for the
Benefit of SAMUEL SIMMONDS, and the
Children of the Deceased, Namely: LEONA
SIMMONDS, NELLIE SIMMONDS, DO-
REEN SIMMONDS, ELI SIMMONDS,
MARGARET SIMMONDS and ARNOLD
SIMMONDS,

Plaintiff,

vs.

WIEN ALASKA AIRLINES, INC.,

Defendant.

COMPLAINT

Comes Now the above-named Plaintiff and for
First Cause of Action against the above-named De-
fendant complains and alleges as follows:

I.

That the Plaintiff is the duly appointed qualified
and acting Administrator of the Estate of Martha
Simmonds, Deceased.

II.

That the Defendant is now, and during all of the
times herein mentioned, has been a corporation
existing under and by virtue of the laws of the
Territory of Alaska and engaged in business in the
Territory of Alaska, with offices in Fairbanks,
Alaska.

III.

That the Defendant, during all the times herein-after mentioned was, and now is, engaged in business of a commercial and common carrier of passengers and freight by airplanes for hire, within the Territory of Alaska, and in and around the village of Barrow, Alaska.

IV.

That on the 10th day of October, 1951, Martha Simmonds, Deceased, purchased of the defendant transportation by airplane from Meade River Coal Mine, Alaska, to Barrow, Alaska. That thereafter and on said date, the airplane of the defendant was flying from Meade River Coal Mine, Alaska, to Barrow, Alaska. That aboard said airplane as a passenger for hire was Martha Simmonds, Deceased. That said airplane was piloted by an employee of the defendant, one George Harrington, and was under its sole operation, direction and control.

V.

As said airplane in its flight in the air was approximately three miles West of the village of Barrow, Alaska, said airplane through the carelessness and negligence of the defendant crashed to the ground.

VI.

That plaintiff states that at the time of her death the intestate left surviving her, himself as widower, and six children, namely: Leona Simmonds, age 8; Doreen Simmonds, age 6; Eli Simmonds, age 5;

Margaret Simmonds, age 4, and Arnold Simmonds, age 2½.

VII.

Plaintiff further states that prior to the date of the accident, October 10, 1951, the said intestate had always been a healthy, robust woman; that she had always followed the occupation of housewife and mother of the children aforementioned; that she had at all times been in good health and performed her duties as housewife with high ability and efficiency, and was extremely competent in managing and caring for her children, and the home, and Plaintiff. That at the time of her death she was 27 years of age and had an expectancy of life of 36.56 years. That all the Plaintiffs have been totally deprived of the affection, society, companionship, and comfort of the said deceased as wife and mother and have been deprived of her care, service and comfort.

VIII.

Plaintiff states that by reason of the loss and companionship of said wife on account of the negligence as aforesaid, that he has been damaged in the sum of Five Thousand (\$5,000.00) Dollars.

IX.

Plaintiff further alleges that by reason of the negligence aforesaid, the children of Martha Simmonds, Deceased, have been deprived of the companionship, and motherly care and supervision of the said intestate, and Plaintiff is thereby damaged in the further sum of Ten Thousand (\$10,000.00) Dollars, for the benefit of the estate which Plaintiff

should have and recover, all of the aforesaid in the aggregate sum of Fifteen Thousand (\$15,000.00) Dollars.

Comes Now the above-named Plaintiff and for a Second and Alternative Cause of Action against the above-named Defendant complains and alleges as follows:

I.

Plaintiff realleges the allegations of Paragraphs I, II, III and IV of his First Cause of Action,

II.

As said airplane in its flight in the air was approximately three miles West of the village of Barrow, Alaska, said airplane crashed on the ground by reason of the carelessness and negligence of the Defendant and its pilot as follows:

1. Failing to discern the altitude of the airplane and allowing it to fly into the ground.

III.

Plaintiff adopts the allegations of Paragraphs VI, VII, VIII and IX of his First Cause of Action.

Wherefore, Plaintiff prays judgment in the sum of Fifteen Thousand (\$15,000.00) Dollars, and for Plaintiff's costs and disbursements and a reasonable attorney fee.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed May 21, 1953.

[Title of District Court and Cause.]

MOTION

Comes Now the above-named defendant and moves against the complaint of the plaintiff, now on file herein, as follows:

I.

To make Paragraph VII of said complaint more definite and certain by alleging more particularly the phrase “* * * expectancy of life of 36.56 years.”

II.

To strike from Paragraph VII of said complaint the last sentence thereof, beginning with the words “That all * * *” in the eighth line and extending to the end of said paragraph, upon the grounds and for the reason that the same is irrelevant and immaterial.

III.

To strike all of Paragraph VIII from said complaint upon the grounds and for the reason that the same is irrelevant and immaterial.

IV.

To strike from Paragraph IX of said complaint the words “have been deprived of the companionship and motherly care and supervision of the said intestate * * *” upon the grounds and for the reason that the same is irrelevant and immaterial.

V.

To dismiss said complaint for failure to state any damages recoverable from defendant.

VI.

To like rule on said motion to make more definite and certain, and to strike, with reference to the same paragraphs as realleged in plaintiff's alternative cause of action.

Dated at Fairbanks, Alaska, this 28th day of July, 1953.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 28, 1953.

[Title of District Court and Cause.]

ORDER

Whereas *plaintiff* above mentioned filed herein upon the 28th day of July, 1953, a motion to dismiss the complaint in this action for failure to state any damages recoverable from defendant, and further set forth other motions, to wit, to strike from said complaint, and to make more definite and certain; and

Whereas said motion came on for hearing upon the 4th day of September, 1953, the attorneys for the parties having stipulated to submit said motions to the court upon briefs at specified times; and

Said briefs having been duly filed in this cause,

It is hereby ordered and adjudged that said motions be denied, *plaintiff's* theory of recovery being consistent with the Alaska wrongful death statute, No. 61-7-3, A.C.L.A., 1949.

Done at Fairbanks, Alaska, this 30th day of December, 1953.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed and entered December 30, 1953.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes Now the above-named Plaintiff and for First Cause of Action against the above-named Defendant, complains and alleges as follows:

I.

That the Plaintiff is the duly appointed qualified and acting Administrator of the Estate of Martha Simmonds, Deceased.

II.

That the Defendant is now, and during all of the times herein mentioned, has been a corporation existing under and by virtue of the laws of the Territory of Alaska and engaged in business in the Territory of Alaska, with offices in Fairbanks, Alaska.

III.

That the Defendant, during all the times hereinafter mentioned was, and now is, engaged in business of a commercial and common carrier of passengers and freight by airplanes for hire, within the Territory of Alaska, and in and around the village of Barrow, Alaska.

IV.

That on the 10th day of October, 1951, Martha Simmonds, Deceased, purchased of the Defendant transportation by airplane from Meade River Coal Mine, Alaska, to Barrow, Alaska. That thereafter and on said date, the airplane of the Defendant was flying from Meade River Coal Mine, Alaska, to Barrow, Alaska. That aboard said airplane as a passenger for hire was Martha Simmonds, Deceased. That said airplane was piloted by an employee of the Defendant, one George Harrington, and was under its sole operation, direction and control.

V.

As said airplane in its flight in the air was approximately three miles West of the village of Barrow, Alaska, said airplane through the carelessness and negligence of the Defendant crashed to the ground.

VI.

That Plaintiff states that at the time of her death the intestate left surviving her, himself as widower, and six children, namely: Leona Simmonds, age 8; Doreen Simmonds, age 6; Eli Simmonds, age 5;

Margaret Simmonds, age 4, and Arnold Simmonds, age 21½.

Plaintiff further states that prior to the date of the accident, October 10, 1951, the said intestate had always been a healthy, robust woman, that she had always followed the occupation of housewife and mother of the children aforementioned; that she had at all times been in good health and performed her duties as housewife with high ability and efficiency, and was extremely competent in managing and caring for her children, and the home. and Plaintiff. That at the time of her death, she was 27 years of age and had an expectance of life of 36.56 years.

VIII.

That the said Martha Simmonds left her surviving, her widower, Samuel Simmonds the Plaintiff herein, and those children named in Paragraph VI thereof, each of whom are still living and by the death of said Martha Simmonds, as aforesaid, they were damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars. Wherefore, Plaintiff demands Judgment for damages in the amount of Fifteen Thousand (\$15,000.00) Dollars and for all other proper relief.

Comes Now, the above-named Plaintiff and for a Second and Alternative Cause of Action against the above-named Defendant complains and alleges as follows:

I.

Plaintiff realleges the allegations of Paragraphs I, II, III and IV of his First Cause of Action.

II.

As said airplane in its flight in the air was approximately three miles West of the village of Barrow, Alaska, said airplane crashed on the ground by reason of the carelessness and negligence of the Defendant and its pilot as follows:

1. Failing to discern the altitude of the airplane and allowing it to fly into the ground.

III.

Plaintiff adopts the allegations of Paragraphs VI, VII and VIII of his First Cause of Action.

Wherefore, Plaintiff prays judgment in the sum of Fifteen Thousand (\$15,000.00) Dollars, and for Plaintiff's costs and disbursements and a reasonable Attorney fee.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 7, 1954.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the defendant above named, and for answer to the Amended Complaint of Plaintiff, admits, denies, and alleges as follows:

First Cause of Action

I.

Defendant admits the allegations contained in Paragraphs I, II, and III of Plaintiff's First Cause of Action.

II.

For answer to paragraph IV of Plaintiff's First Cause of Action, Defendant, for want of sufficient information, denies that Martha Simmonds "purchased" of the Defendant transportation by airplane from Meade River Coal Mine, Alaska, to Barrow, Alaska, and admits each and every other allegation in said paragraph contained.

III.

Defendant admits that said airplane in its flight in the air was approximately three miles west of the village of Barrow, Alaska, when said airplane crashed to the ground; and specifically denies that said crash was through the fault, carelessness and negligence of the Defendant.

IV.

For answer to paragraphs VI, VII, and VIII of Plaintiff's first cause of action, Defendant does **not** have sufficient information from which to form a belief, therefore denies the same, and the whole thereof.

Second and Alternative Cause of Action

I.

For Defendant's answer to the reallegation by Plaintiff of the allegations in Paragraphs I, II,

III, and IV in his First Cause of Action, in Paragraph I of his Second and Alternative Cause of Action, Defendant adopts as its answer thereto its answer to said paragraphs.

II.

For answer to paragraph II of said Cause of Action Defendant admits that said airplane in its flight in the air approximately three miles west of the village of Barrow, Alaska, crashed on the ground, and denies each and every other allegation in said paragraph contained.

III.

For answer to paragraph III of said Second and Alternative Cause of Action Defendant adopts his answer to the paragraphs VI, VII and VIII of Plaintiff's first cause of action as above stated.

Wherefore, Defendant having fully answered the Complaint of Plaintiff, it prays that Plaintiff take nothing thereby, and that the same be dismissed with prejudice and with costs to the Defendant including a reasonable attorney's fee.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed October 13, 1954.

[Title of District Court and Cause.]

MOTION TO AMEND COMPLAINT

Comes Now, the above-named Plaintiffs, by and through their attorney, Robert A. Parrish, and respectfully move the Honorable Court as follows:

That Plaintiffs be permitted to amend their Complaint on file herein by interlineation changing the amount of the damages sought to be recovered from the sum of Fifteen Thousand (\$15,000.00) Dollars, to the sum of Fifty Thousand (\$50,000.00) Dollars. This motion is based upon the records and files of the above-entitled cause the reasons set forth in Plaintiffs' brief attached hereto.

Dated at Fairbanks, Alaska, this 19th day of September, 1955.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Before amendment in 1955, the Alaska wrongful death statute, Section 61-7-3, A. C. L. A., 1949, as amended by Chapter 89, S. L. A., 1949, gave to the personal representatives of the decedent an action

against the wrongful doer for damages; maximum recoverable damages were limited to \$15,000. The statute was amended by Chapter 153, S. L. A., 1955, and the amendment, in addition to increasing the maximum recoverable damages to \$50,000, specifically enumerates the elements of recoverable damages, many of which were not recoverable under the statute prior to the 1955 amendment.

This action was filed in 1953 in the name of the administrator of the estate of the decedent for the benefit of decedent's surviving husband and children. Damages in the amount of \$15,000 were sought. Claiming that the 1955 amendments are applicable to this action, plaintiff has moved for leave to amend the complaint by substituting in the prayer for damages the figure, \$50,000, for the figure, \$15,000.

The motion is denied. Section 19-1-1, A.C.L.A. 1949, amended by Chapter 4, E.S. 1955; *Field v. Witt Tire Co. of Atlanta, Ga., Inc., et al.*, 200 F. 2d 74 (2nd Cir. 1952). *Theodosia v. Keeshan Motor Express Co.*, 341 Ill. App. 8, 92 N.E. 2d 794, 1950.

The question of the measure of damages to be applied in this action has been raised and in an effort to clarify this matter for counsel prior to trial the court takes this opportunity to express its views.

Plaintiff argues that although the measure of damages in the case where there are no surviving statutory beneficiaries is the loss of benefit to the

estate, *Jennings v. Alaska Treadwell*, 170 Fed. 146 (9th Cir. 1909), where there are surviving statutory beneficiaries the damages recoverable are measured by the pecuniary loss sustained by the surviving statutory beneficiaries. He points to the Oregon wrongful death statute, Sec. 8-903, O.C.L.A., and to *Hansen v. Hays*, 175 Ore. 358, 154 P. 2d 202, indicating that under the Oregon statute where there are surviving statutory beneficiaries the measure of damages is the loss of pecuniary benefit to them, and where there are no surviving statutory beneficiaries the damages are the loss of benefit to the estate. Plaintiff then argues that where there are surviving statutory beneficiaries the Alaska statute, prior to its recent amendment, and the Oregon statute are nearly identical, and that the rule laid down in *Hansen v. Hays* should be followed.

Under the Alaska statute, prior to its amendment in 1955, where there are surviving statutory beneficiaries any sum collected is exclusively for their benefit and is distributed to them by the personal representative, plaintiff in the action, as though it were unbequeathed assets left in his hands, after the payment of all debts and expenses of administration. It is arguable that the recovery may be used for the payment of debts and expenses of administration since it is to be distributed as if it were unbequeathed assets, after the payment of debts and expenses of administration, but this interpretation is inconsistent with the provision that the

amount recovered is exclusively for the benefit of the surviving statutory beneficiaries, and the correct interpretation is that the recovery cannot be used for the payment of debts and expenses of administration, but it goes exclusively to the statutory beneficiaries except for the expenses of the action allowed by the court. This being true, the recoverable damages should be measured by the pecuniary loss suffered by the beneficiaries and not by the loss of benefit to the estate which in no way participates in the recovery.

This reasoning is bolstered by the fact that the Western States, with the possible exception only of New Mexico, uniformly follow the pecuniary loss to the beneficiaries rule. And the court has found no Alaska cases, nor have any been cited to it, which hold to the contrary. In fact, *Koske v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334, appears to support this reasoning, and see the able opinion by Judge Diamond in *Dralle v. Steele*, 13 Alaska 680 (1952) directly on this point. There is no indication that the decedent left surviving statutory beneficiaries in *Linge's Administrator v. Alaska Treadwell Co.*, 3 Alaska 9 (1906); *Jennings v. Alaska Treadwell Gold Mining Co.*, *supra*; *Caswell v. Copper River & N. W. Ry.*, 4 Alaska 709 (1913); *The Princess Sophia*, 35 F. 2d 736 (W. D. Wash. 1929), *aff'd* 61 F. 2d 339 (9th Cir. 1932); or *Kreidler v. Ketchikan Spruce Mills*, 10 Alaska 365 (1943). And the Court of Appeals in the *Jennings* case

limited the benefit of estate rule to cases where the decedent left no surviving statutory beneficiaries:

“It is true that the two statutes are not identical as a whole, but the change in the Alaska Code from the Oregon code makes more definite and certain the purpose of Congress to adopt the construction of the Supreme Court of Oregon for estates where the decedent left no husband, wife, or children. In such case the amount recovered should be administered as other personal property of the deceased person, as provided in the Oregon statute; that is to say, the amount received should be for the benefit of the estate, and the damage to the estate would therefore be the value of the life to the estate, measured by the earning capacity, thriftiness, and probable length of the life of the deceased.”

The court will therefore apply in this action as the measure of damages the pecuniary loss to the statutory beneficiaries.

Dated at Fairbanks, Alaska this 30th day of November, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed December 1, 1955.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTION No. 1

If you find for the plaintiff and against the defendant in this action, you must then determine the amount of damages which you believe the plaintiff is entitled to recover from the defendant. The true measure of damages in such event is the pecuniary loss suffered by the estate. Such loss would be what the deceased would probably have earned by her intellectual or bodily effort of labor in her business or profession during the remainder of her life, which, to the extent of her net savings would have gone for the benefit of her estate. In determining this amount, you should consider her age, ability, disposition to labor, and her habits of living and expenditures and disposition to save.

If the husband of the deceased paid the expenses of her last illness and funeral expenses, or has obligated himself to pay them, you shall take this into consideration in determining the amount of damages allowable.

You may not consider as an element of damages, the grief or anguish of the surviving relatives, including her husband and children, or the loss to the widower and children of the love and affection of the wife and mother and loss of the consolation of her presence in the family, or the pain and suffering of the deceased.

The amount of damages which you may allow must not exceed the sum of \$15,000.00.

Respectfully submitted,

COLLINS and CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Defendants.

[Endorsed]: Filed December 5, 1955.

COURT'S INSTRUCTIONS

No. 2

This is an action brought under the Alaska wrongful death statute to recover damages for the death of Martha Simmonds caused by the crash of a Wien Alaska Airlines airplane on a flight from Meade River Coal Mine to Barrow on October 10, 1951. Under this statute the personal representative of the decedent is the plaintiff in the action and all damages recovered are exclusively for the benefit of the decedent's surviving spouse and children.

No. 3

The following matters are to be considered as having been established in this action, either by stipulation of the parties or by uncontradicted testimony:

The plaintiff, Samuel Simmonds, is the duly appointed, qualified and acting administrator of the

estate of Martha Simmonds. On October 10, 1951, the defendant, Wien Alaska Airlines, was a common carrier operating an airline, and on that day Martha Simmonds was a passenger for hire on one of defendant's aircraft on a flight from Meade River Coal Mine to Point Barrow. This aircraft, which was under the exclusive control and management of the defendant, crashed near the village of Barrow, killing Martha Simmonds and the pilot, George Harrington, who was a duly licensed pilot.

Martha Simmonds is survived by her husband, Samuel Simmonds, and six children, Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds.

No. 11

When, as in this case, the instrumentality which causes the injury is under the exclusive control and management of the defendant and the accident is such as in the ordinary course of things does not occur if the one having such control or management uses proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident occurred as a result of the failure of the defendant to use proper care.

No. 12

Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the evidence of negligence, either inferred from the happening of

the accident as aforesaid or otherwise proven, must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendant.

If such a preponderance in plaintiff's favor exists, then you must determine whether such negligent conduct on the part of defendant was a proximate cause of the injury; but if it does not exist, if the evidence preponderates in defendant's favor, or if in the jury's mind there is an even balance as between the weight of the evidence of negligence and the weight of the contrary explanation, neither having the more convincing force, then the verdict must be for the defendant.

No. 13

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.

No. 14

If under the court's instructions you find that plaintiff is entitled to a verdict, you will award such sum as, under all the circumstances of the case, compensates the surviving husband and children of Martha Simmonds for the pecuniary loss they have suffered by reason of her death; provided, however, you may not return a verdict for plaintiff in excess of \$15,000.

No. 15

In determining that pecuniary loss, you may consider not only the financial support, if any, which the decedent's husband and children would have received except for her death, but also the pecuniary value of the society, comfort, care, protection and right to receive support, if any, which decedent's husband and children have lost by reason of the death. In weighing these matters you may consider the age of the decedent and of decedent's husband and children; the state of health and the physical condition of the decedent and of decedent's husband and children as it existed at the time of the death and immediately prior thereto; their station in life; their respective expectancies of life as shown by the evidence; the disposition of the decedent, whether it was kindly, affectionate or otherwise; whether or not she showed an inclination to contribute to the support of her husband and children, or any of them; the earning capacity of the decedent and of her husband and children, and such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, comfort and protection, which decedent's husband and children might have expected to receive from the decedent had she lived. With respect to the matter of life expectancies, you must keep this point in mind: If you decide for plaintiff, the prospective periods of time that will be of concern to you in determining the pecuniary loss of each beneficiary is only the shorter of the life ex-

pectancies of the decedent and that beneficiary, because manifestly one could derive pecuniary benefit from the life of the other only for the period that both would have lived.

No. 17

The right of one person to receive support from another is not destroyed by the fact that the former does not need the support, nor by the fact that the latter has not provided it, and even if one or both of those conditions have existed, the mere right to receive support may have a pecuniary value and thus may be the basis of assessing damages against one who negligently has caused the death of the person from whom the support was due.

No. 18

If you return a verdict for plaintiff, it shall be for a single sum, representing the aggregate of the pecuniary loss suffered by decedent's husband and children. In other words, if you return a verdict for plaintiff, you will not allocate the damages among decedent's husband and children.

[Title of District Court and Cause.]

VERDICT No. I

We, the jury in the above-entitled cause, on the complaint find in favor of the plaintiff and assess damages at the sum of \$11,500.00 (Eleven Thousand Five Hundred Dollars).

Dated at Fairbanks, Alaska, this 7th day of December, 1955.

/s/ HAROLD A. WILLBANKS,
Foreman.

[Endorsed]: Filed and entered December 8, 1955.

In the District Court for the District of Alaska,
Fourth Division

No. 7524

SAMUEL SIMMONDS, Administrator of the
Estate of MARTHA SIMMONDS, Deceased,
for the Benefit of SAMUEL SIMMONDS, and
the Children of the Deceased, Namely: LEONA
SIMMONDS, NELLIE SIMMONDS, DO-
REEN SIMMONDS, ELI SIMMONDS,
MARGARET SIMMONDS and ARNOLD
SIMMONDS,

Plaintiffs,

vs.

WIEN ALASKA AIRLINES, INC.,

Defendant.

JUDGMENT

This Cause came on regularly for trial, plaintiff being present in Court and represented by his attorney, Robert A. Parrish, and the defendant being represented by its attorney, Charles J. Clasby, and

a jury having been duly empanelled and sworn to try the issues in the above-entitled cause and testimony and evidence having been submitted on behalf of plaintiff and defendant, and arguments of counsel for the respective parties to this action having been made, and the Court having instructed the Jury as to the law in the case, and the Jury having considered the law and the evidence duly returned into Court their Verdict of the 7th day of December, 1955, as a sealed Verdict on the 8th day of December, 1955, as provided by stipulation of the respective attorneys, and in words and figures, as follows:

Verdict No. I

We, the jury in the above-entitled cause, on the complaint find in favor of the plaintiff and assess damages at the sum of Eleven Thousand Five Hundred Dollars (\$11,500.00).

Dated at Fairbanks, Alaska, this 7th day of December, 1955.

/s/ HAROLD A. WILLBANKS,
Foreman.

[Endorsed]: Filed December 8, 1955, D.C.T.A.

Now, Therefore, in accordance with the Verdict of the Jury,

It Is Hereby Ordered, Adjudged and Decreed, that plaintiff shall have judgment against, and re-

cover from the defendant, Wien Alaska Airlines, Inc., the sum of Eleven Thousand Five Hundred Dollars (\$11,500.00), and the sum of Six Hundred Dollars (\$600.00) as attorney's fees together with his costs and disbursements in the sum of \$1,083.68 Dollars as taxed by the Clerk of the Court, said Judgment to draw interest at the rate of 6 per cent per annum from the date hereof until paid.

Let execution issue hereon after ten (10) days.

Done at Fairbanks, Alaska, this 22nd day of December, 1955.

/s/ VERNON D. FORBES,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered December 22, 1955.

[Title of District Court and Cause.]

ORDER

The plaintiff was represented by Robert A. Parrish; the defendant by Charles J. Clasby.

Mr. Clasby presented argument on the defendant's Motion for a New Trial. Mr. Parrish waived any argument. It was Ordered that the motion be denied.

Entered April 6, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73 (b)

Notice Is Hereby Given that Wien Alaska Airlines, Inc., defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 22, 1955.

COLLINS, CLASBY and
SCZUDLO,

/s/ CHAS. J. CLASBY,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 2, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that I mailed a copy of the Notice of Appeal filed by the defendant and appellant to the counsel of the plaintiff and appellee, pursuant to Rule 73-B, Rules of Civil Procedure, on the 2nd day of May, 1956.

Witness my hand and the seal of this Court this 17th day of May, 1956.

[Seal] /s/ JOHN B. HALL,
Clerk.

[Endorsed]: Filed May 18, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, the defendant in the above-entitled action, Wien Alaska Airlines, Inc., has this day filed with the District Court for the District of Alaska, Fourth Division, its notice of appeal from the judgment in the above-entitled action entered on December 22, 1955, in favor of the plaintiff;

Now, Therefore, in consideration of the premises and of such appeal, we, Wien Alaska Airlines, Inc., as principal, and Sigurd Wien and Fritz Wien, as sureties, do hereby undertake and promise, and do acknowledge ourselves bound unto the plaintiff in the sum of two hundred fifty and no one-hundredths dollars (\$250.00), conditioned for the payment of the costs on appeal if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

Dated this 2nd day of May, 1956.

WIEN ALASKA AIRLINES,
INC.,

Principal;

By /s/ SIGURD WIEN,
President.

Attest:

/s/ RICHARD KING,
Secretary.

/s/ SIGURD WIEN,

/s/ FRITZ WIEN,

Sureties.

Service of copy acknowledged.

[Endorsed]: Filed May 2, 1956.

[Title of District Court and Cause.]

STIPULATION

It is stipulated by the parties to this cause by their respective counsel that at the trial of this cause the following occurred:

1. The plaintiff introduced evidence, properly objected to by defendant, establishing that decedent was survived by Samuel Simmonds, her husband, and Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds, her children; and that these persons were affected by the death of Martha Simmonds.

2. The plaintiff introduced no evidence on the theory that the proper measure of damages was the loss to the estate of Martha Simmonds as a result of her untimely death.

/s/ ROBERT A. PARRISH,

Attorney for Appellee.

COLLINS, CLASBY and
SCZUDLO,

CHARLES J. CLASBY,

/s/ CHAS. J. CLASBY,

Of Counsel, Attorneys for
Appellant.

Dated May 16, 1956.

[Endorsed]: Filed May 16, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now Wien Alaska Airlines, Inc., appellant herein, by its attorneys, Collins, Clasby and Sczudlo and Charles J. Clasby, and states that the points upon which it intends to rely in this appeal are as follows:

1. The court erred in denying defendant's motion to dismiss, filed July 28, 1953.

2. The court erred in admitting evidence of the loss suffered by the widower and children of the deceased individually.

3. The court erred in refusing to give defendant's requested instruction numbered 1.

4. The court erred in giving instruction numbered 3.

5. The court erred in giving instruction numbered 14.

6. The court erred in giving instruction numbered 15.

7. The court erred in giving instruction numbered 17.

8. The court erred in giving instruction numbered 18.

9. The court erred in overruling defendant's motion to dismiss, made at the close of the plaintiff's case.

10. The court erred in overruling plaintiff's motion for new trial.

The court erred in adopting, as the basis for recovery, the damages suffered by the widower and children of decedent rather than the loss resulting to decedent's estate by virtue of her death, which is the loss recoverable under the Alaska wrongful death statute and the cases construing the statute. Each of the errors stated above involves the trial court's ruling in the particular instance that the proper basis of recovery was the loss suffered by the named individuals instead of the loss suffered by the estate by reason of the death of Mrs. Simmonds.

COLLINS, CLASBY and
SCZUDLO,

CHARLES J. CLASBY,

/s/ CHAS. J. CLASBY,

Of Counsel, Attorneys for
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 16, 1956.

In the District Court for the District of Alaska,
Fourth Judicial Division

SAMUEL SIMMONDS, Administrator of the
Estate of MARTHA SIMMONDS, Deceased,
et al.,

Plaintiff,

vs.

WIEN ALASKA AIRLINES, INC.,

Defendant.

Appearances:

ROBERT A. PARRISH,
Attorney for the Plaintiff.

CHARLES J. CLASBY,
Attorney for the Defendant.

Fairbanks, Alaska.

December 6, 1955.

Before: Hon. Vernon D. Forbes,
District Judge, and Jury.

TRANSCRIPT OF PART OF MR. CLASBY'S
ARGUMENT ON MOTION TO DISMISS
THE ACTION

Mr. Clasby: At this time we move that the action be dismissed. The basis for our motion is in most respects similar to that urged in our trial brief.

The other point we get back to again, and that is

pointed out in the trial brief, that this is an action by Samuel Simmonds, period. Look at the pleading. Look at it and see if you can find anywhere that this action is brought by an administrator. It is clear under our statute that the action must be maintained by the administrator.

The heading of this case is Samuel Simmonds, and he goes ahead and describes himself as administrator. The Court is familiar with cases that hold that where all you do is just describe yourself that that does not mean you are doing the thing in your official capacity. And you get down to allegation VIII, which is the only allegation in the complaint concerning the cause of action itself. It says: "That the said Martha Simmonds left her surviving, her widower, Samuel Simmonds, the Plaintiff herein, and those children named in Paragraph VI thereof, each of whom are still living and by the death of said Martha Simmonds, as aforesaid, they were damaged in the sum of Fifteen Thousand Dollars."

It states the children and the husband or widower, and the widower in that paragraph is named as the plaintiff.

It is clear from every case that has been called to the attention of the Court arising in Alaska under our wrongful death statute and under the statute itself that the action belongs to the administrator. The administrator must be the one that brings the suit. It is only incidental to that action in the event there is a surviving widower and children that the damages or amount recovered may be for their exclusive benefit, but it still does not change the neces-

sity that the administrator in his official capacity be the plaintiff and bring the action. In the Princess Sophia case the Court will recall there were foreign administrators attempting to bring the action, and it was ruled out, and that ruling was upheld in the Ninth Circuit. You had mothers and fathers and relatives within the class involved in our statute who also brought actions or filed claims, and the Court ruled that out, saying that the action had to be brought by the administrator, and the Ninth Circuit sustained that ruling, and the whole language of the opinion in the Princess Sophia case, both below and above, as well as Jennings vs. Treadwell, and the other cases we have cited to the Court, is that we don't have an action for the benefit of survivors in Alaska. The whole action is in the estate. It belongs to the estate. So we urge again at this particular point that the complaint itself is defective and it has not been proved by any evidence that has been introduced, and because the complaint fails to state a cause of action, we think the action should be dismissed.

The third ground for our motion is again the point we have urged on the Court several times, and that is that the measure of damages is the loss to the estate, and here there has been a failure of proof as to any loss to the estate. In that connection I won't go over the authorities that we have submitted to the Court prior to this in our brief but refer again to a brief survey of those authorities as they appear attached to Defendant's Requested Instruction No. 1, noting particularly that in the

Princess Sophia case there were children within the class that we have here involved, and the Court announced only one rule of recovery under the Alaska statute, and that is the loss to the estate. The fact that the money is distributed—and it is noted particularly it is distributed back in the probate court again, not up here or by the trial court—it is the probate court that sets aside the amounts of the costs of the action.

In the case of Kreidler vs. Ketchikan Spruce Mills, a trial without a jury, there were four children surviving. The Court reaffirmed the rule that had been announced in prior cases that the damage was limited to the estate, and gave them \$1,500, saying that the damages to the estate caused by the untimely death through the negligence of the defendant, measured by the value of decedent's life to the estate, "must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration."

That case preceded the re-enactment of our Act by Chapter 89 of the Session Laws of Alaska in 1949 and the Court is familiar with the authorities that the Legislature's re-enactment of an Act such as occurred here, where no change was made except in the amount, carries with it the judicial interpretations of the courts of jurisdiction at the time of re-enactment.

We also point out to the Court the recent case of Dralle vs. Steele, where Judge Dimond instructed in the case where a widow and a child survived that

the loss to the estate by the untimely death was the measure of recovery. A new trial was granted on a different point and at the time of the new trial Judge McCarrey instructed and followed Judge Dimond's instructions. Those instructions, of course, do run contrary to the printed opinion of Judge Dimond, evidencing a change in his mind as to the rule, as the printed opinion announced in connection with a motion. So it is our conclusion that the motion should be allowed and that the three grounds are well taken: First, that the complaint fails to state a cause of action; second, that there is no evidence of damages or loss as is contemplated in the rule applicable to losses in cases of this kind under the decided opinions by the Courts in Alaska. We have been unable to discover where the Ninth Circuit has indicated any different or contrary rule or any Court in Alaska has ever decided contrary to that rule.

December 7, 1955.

TRANSCRIPT OF DEFENDANT'S EXCEPTIONS TO CERTAIN INSTRUCTIONS OF THE COURT TO THE JURY

Mr. Clasby: May it please the Court, we object to the last paragraph of Instruction No. 3. We have heretofore stated the basis for such objections and we would like the record to show a repetition of those at this time.

We except to Instruction No. 14 and at the same time to the failure to give our requested instruction No. 1, and on the same basis that we have heretofore stated with respect to our motions, and the same exception is taken to Instruction No. 15 and also the same exception to No. 17 and No. 18.

Those are all based upon the citations we have heretofore given to the Court as to the rule of damages we believe to have been followed in Alaskan cases of this kind.

United States of America,
Territory of Alaska—ss.

I, Esther M. Rasmussen, official court reporter for the aforementioned Court, do hereby certify that the foregoing pages, numbered 1 to 6, inclusive, constitute a true and accurate transcript of that portion of my original shorthand notes taken at the time of the oral proceedings had upon the 6th and 7th days of December, 1955, in open Court in Cause No. 7524 Civil.

Dated at Fairbanks, Alaska, this 12th day of May, 1956.

/s/ ESTHER M. RASMUSSEN.

[Endorsed]: Filed May 16, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the list below comprises all proceedings in this cause listed on the Designation of Record of the defendant and appellant, and the Designation of Record of the plaintiff and appellee, viz.:

1. Complaint, filed May 21, 1953.
2. Motion of Defendant, filed July 28, 1953.
3. Minute Order Denying Above Motion.
4. Amended Complaint, filed July 7, 1954.
5. Answer to Amended Complaint.
6. Memorandum Opinion, dated November 30, 1955.
7. Defendant's Requested Instruction No. 1.
8. The Court's Instructions 3, 14, 15, 17, 18.
9. Transcript of Objection of the defendant to the above-listed instructions, and the refusal of the Court to give defendant's Instruction No. 1; also, dismissal denied.
10. Verdict, filed December 8, 1955.
11. Judgment, dated December 22, 1955.
12. Minute Order Denying Motion for New Trial.
13. Notice of Appeal, filed May 2, 1956.
14. Affidavit of Clerk re mailing.
15. Bond for Costs on Appeal.
16. Designation of Record of Appellant.
17. Stipulation Regarding Evidence.

18. Statement of Points on Appeal.

19. The Court's Instructions Nos. 2, 11, 12 and 13.

20. Plaintiff's Motion to Amend Complaint, filed September 19, 1955.

21. Designation of Record on Appeal of Plaintiff and Appellee.

Witness my hand and the seal of the above-entitled Court the 29th day of May, 1956.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 15149. United States Court of Appeals for the Ninth Circuit. Wien Alaska Airlines, Inc., Appellant, vs. Samuel Simmonds, Administrator of the Estate of Martha Simmonds, Deceased, for the Benefit of Samuel Simmonds and the Children of the Deceased, Namely: Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed June 4, 1956.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15149

WIEN ALASKA AIRLINES, INC.,

Appellant,

vs.

SAMUEL SIMMONDS, Administrator of the
Estate of MARTHA SIMMONDS, Deceased,
for the Benefit of SAMUEL SIMMONDS and
the Children of the Deceased, Namely: LEONA
SIMMONDS, NELLIE SIMMONDS, DO-
REEN SIMMONDS, ELI SIMMONDS,
MARGARET SIMMONDS and ARNOLD
SIMMONDS,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF CONTENTS OF REC-
ORD ON APPEAL

Comes now Wien Alaska Airlines, Inc., appellant herein, by its attorneys, Collins, Clasby and Sezudlo, and Charles J. Clasby, and hereby adopts and incorporates herein by reference thereto the typewritten statement of points on appeal and designation of contents of record on appeal certified to this court by the Clerk of the District Court for the

Fourth Division, District of Alaska, in his transcript of the record of this cause.

COLLINS, CLASBY and
SCZUDLO,

By /s/ CHAS. J. CLASBY,
Of Counsel, Attorneys for
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1956.

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

THE HISTORY OF THE

No. 15,149

United States Court of Appeals
For the Ninth Circuit

WIEN ALASKA AIRLINES, INC.,
Appellant,

vs.

SAMUEL SIMMONDS, Administrator of
the Estate of Martha Simmonds,
Deceased, for the benefit of Samuel
Simmonds, and the children of the
deceased, namely, Leona Simmonds,
Nellie Simmonds, Doreen Simmonds,
Eli Simmonds, Margaret Simmonds
and Arnold Simmonds,
Appellee.

BRIEF OF APPELLANT.

CHARLES J. CLASBY,
1000 Polaris Building, Fairbanks, Alaska,
Attorney for Appellant.

COLLINS, CLASBY & SCZUDLO,
1000 Polaris Building, Fairbanks, Alaska,
Of Counsel.

FILED

SEP 28 1955

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Jurisdictional statement	1
Statement of case	2
The issue	3
The manner in which the issue was raised	5
The pleadings	5
The evidence	7
Instructions	7
Specification of error	10
Argument	10
Summary	10
I. This court, by its decisions in the cases <i>Jennings v. Alaska Treadwell Gold Mining Co.</i> and the <i>Princess Sophia</i> (supra) has established that the action created by the Alaska wrongful death statute belongs to the administrator of the estate. Irrespective of the survival of a spouse and/or children, and that the measure of damages is the loss to the estate	11
II. The courts have uniformly applied the "loss to the estate" rule of damages under the Alaska wrongful death statute, in all cases, including those in which a spouse and/or children survived	22
III. The re-enactment of the wrongful death act, by the legislature of Alaska in 1949 (Chapter 89), providing as its only change a raise in the recovery limit from \$10,000.00 to \$15,000.00 constitutes a legislative ratification of judicial interpretation then existing and is thereafter binding on the courts	26
Conclusion	29

Table of Authorities Cited

Cases	Pages
Alaska Treadwell Gold Mining Company v. Cheney (C.C.A. 9th, 1908), 162 Fed. 593, 3 Alaska Fed. 142	12, 15, 22
Caswell v. Copper River and N. W. Ry. (3rd Div. 1913), 4 Alaska 709	22
Cheney v. Alaska Treadwell Gold Mining Co. (C.C.A. 9th, 1906), 148 Fed. 808, 2 Alaska Fed. 641	12, 15
Draille v. Steele (3rd Div. 1952), 13 Alaska 680	8, 25, 28
Jennings v. Alaska Treadwell Gold Mining Co. (9th Cir. 1909), 170 Fed. 146, 3 Alaska Fed. 350	10, 12, 15, 16, 21, 22, 25, 26, 27, 28
Kriedler v. Ketchikan Spruce Mills (1st Div. 1943), 10 Alaska 365	22, 24, 25, 27, 28
Lindeman v. State Indust. Accid. Com., 183 Ore. 245, 192 P. (2d) 732	26
Linge's Administrator v. Alaska Treadwell Gold Mining Co. (1st Div., 1906), 3 Alaska 9	12, 22
Overland v. Jackson, 128 Ore. 455, 275 P. 21	26
Shapiro v. United States, 335 U.S. 1, 68 Sup. Ct. 1375, 92 L. Ed. 1787	26
Stewart v. B. & O. Railroad, 168 U.S. 445	16, 18
The Princess Sophia (1929), 35 Fed. 2d 736	17
The Princess Sophia (C.C.A. 9th 1932), 61 Fed. 2d 339	10, 20, 21, 22, 27, 28

Statutes

A.C.L.A., Sec. 53-1-1 (1949)	1
A.C.L.A., Sec. 61-7-3 (1949)	4

TABLE OF AUTHORITIES CITED

iii

	Pages
Carter Code, Sec. 353	4
Charlton Code, Sec. 353	4
C.L.A., Sec. 1185 (1913)	4
C.L.A., Sec. 3845 (1933)	4
S.L.A. 1949, Chapter 89, Wrongful Death Statute	3, 10
31 Stat. 391, 393	4
28 U.S.C. 1291, 1294	2

No. 15,149

**United States Court of Appeals
For the Ninth Circuit**

WIEN ALASKA AIRLINES, INC.,
Appellant,

VS.

SAMUEL SIMMONDS, Administrator of
the Estate of Martha Simmonds,
Deceased, for the benefit of Samuel
Simmonds, and the children of the
deceased, namely, Leona Simmonds,
Nellie Simmonds, Doreen Simmonds,
Eli Simmonds, Margaret Simmonds
and Arnold Simmonds,
Appellee.

BRIEF OF APPELLANT.

Appellant, the defendant below, is seeking by this appeal review of a final judgment entered by the District Court for the Territory of Alaska on December 22, 1955, based upon a jury verdict of \$11,500.00 in favor of appellee for a death in an airline crash.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska is a Court of general jurisdiction (A.C.L.A. 1949, 53-1-1)

in civil, criminal, equity and admiralty cases. The United States Court of Appeals (Ninth Circuit) has appellate jurisdiction to review by appeal the final decisions of the District Court for the District of Alaska. (28 U.S.C. 1291, 1294.)

STATEMENT OF CASE.

Martha Simmonds died on October 10, 1951 in the crash of a single-engine aircraft, operated by appellant on a non-scheduled bush flight from Umiat (stopping at Meade River for her and her child) to Barrow, Alaska. The crash occurred a few miles southwest of Barrow. The pilot also died in the crash; and the sole survivor of the crash was the infant child of Martha Simmonds, unharmed, likely by reason of being cradled on the back of, and in the parka hood of the mother, a custom common to the Eskimo people. The crash was discovered in a matter of minutes, and a rescue team arrived probably within a half hour after the crash.

Martha Simmonds left surviving, her husband, Samuel, and six minor children: Leona, Nellie, Doreen, Eli, Margaret, and Arnold, the survivor of the crash. All reside at Barrow, Alaska. Samuel Simmonds became the administrator of the estate of Martha by appointment of the Probate Court in the Point Barrow Precinct; and on May 21, 1953 commenced this action.

The Issue.

This action is based on Chapter 89, Session Laws of Alaska for 1949, reading as follows:

“AN ACT

To increase the amount of damages in actions for wrongful death, and amending Sec. 61-7-3 ACLA 1949.

Be it enacted by the Legislature of the Territory of Alaska.

Section 1. Sec. 61-7-3 ACLA 1949 is hereby amended to read as follows:

Sec. 61-7-3. ACTION FOR WRONGFUL DEATH: DISPOSITION OF AMOUNT RECOVERED. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefore against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed *fifteen thousand dollars*, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife, or children, him or her surviving; and when any sum is collected it must be distributed by the Plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration, and when he or she leaves no husband, wife or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person;

but the plaintiff may deduct therefrom the expenses of the action, to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper.

Approved March 23, 1949.” (Emphasis supplied.)

The act amended by Chapter 89 was adopted by Congress for Alaska in 1900. (See: 31 Stat. 391, 393. Carter Code, Sec. 353; Charlton Code, Sec. 353, Sec. 1185 CLA (1913), Sec. 3845 CLA (1933), Sec. 61-7-3, ACLA (1949).) No change was made in the act until 1949, (*supra*) and the only change made by Chapter 89, above, was to raise the recovery limit from \$10,000.00 to \$15,000.00. The law above noted was radically changed by the Legislature for Alaska in 1953 (See: Appendix A), a point of interest in interpreting the 1949 Act.

The plaintiff's case, by the pleadings, evidence and instructions, is founded entirely on the theory that the 1949 act (*supra*) created a separate cause of action vested in the surviving spouse and children, prosecuted by the administrator of the decedent's estate only as a nominal party plaintiff, and under which the measure of damages is the total of the pecuniary loss individually suffered by each beneficiary as a direct result of the untimely death.

The position of the appellant is that the 1949 act creates but *one* cause of action, vested in the administrator of the estate, for the recovery of the *loss to the estate* by reason of the untimely death; and that the manner of distribution is not material to the

measure of damages, the measure being that additional estate which might reasonably have been accumulated by decedent but for her untimely death.

The Manner in Which the Issue Was Raised.

The Pleadings.

The following appears from the original complaint. (Tr. pp. 3 to 6) :

1. In the caption plaintiff does not sue “*as*” administrator; he merely identifies himself, and sue “for the benefit of * * *” the surviving spouse and children.

2. The pleading spells out survivorship in paragraph VI (Tr. p. 4).

3. In paragraph VII of the complaint there is alleged:

“That *all the plaintiff's* have been totally deprived of the affection, society, companionship, and comfort of the said deceased as wife and mother and have been deprived of her care, service and comfort.” (Tr. p. 5.)

4. In paragraph VIII it is alleged:

“Plaintiff states that by reason of the loss and companionship of said wife * * * that he has been damaged in the sum of Five Thousand (\$5,000.00) Dollars.” (Tr. p. 5.)

5. In paragraph IX it is alleged:

“* * * the children * * * have been deprived of the companionship and motherly care and supervision of the said intestate, and plaintiff is

thereby damaged in the further sum of Ten Thousand (\$10,000.00) Dollars * * *”

6. The complaint is consistent with the foregoing pattern, and fails to allege an action *by* the administrator for the *loss to the estate* measured by the probable savings that might have accrued but for the untimely death.

The issue was raised by appellant’s motion to dismiss, and to strike the offending portions of the pleading above noted (Tr. pp. 7, 8). The denial of these motions is claimed as error. (See Tr. pp. 8, 9 for Order, pp. 32, 33 for Points on Appeal.)

Subsequently an amended complaint was filed voluntarily in which the pleader eliminated the objectionable language in paragraph VII (see 3 above), and combined the damage statements into the following allegation (Tr. p. 11):

“VIII

That the said Martha Simmonds left surviving, her widower, Samuel Simmonds, the plaintiff herein, and those children named in paragraph VI thereof, each of whom are still living and by the death of said Martha Simmonds, as aforesaid, they were damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.”

Plaintiff’s theory in the amended complaint not having been changed, and the Court already ruled thereon, appellant answered.

The Evidence.

Plaintiff's evidence was pertinent to counsel's theory of the case; and objections consistent with defendant's position were made, and by the Court overruled. There being no real purpose in reproducing the record for this appeal other than to establish a consistent legal position, counsel have covered the matter by stipulation. (See: Tr. p. 31.)

Appellant made a motion to dismiss at the close of plaintiff's case, (Tr. pp. 34 to 38) which was by the Court denied, which ruling is now claimed as error. (Tr. p. 33 Points on Appeal.)

Instructions.

Appellant requested that the Court give the following instruction (Defendant's Requested Instruction No. 1) (Tr. p. 20):

"If you find for the plaintiff and against the defendant in this action, you must then determine the amount of damages which you believe the plaintiff is entitled to recover from the defendant. The true measure of damages in such event is the *pecuniary loss suffered by the estate*. Such loss would be what the deceased would probably have earned by her intellectual or bodily effort of labor in her business or profession during the remainder of her life, which, to the extent of her net savings would have gone for the benefit of her estate. In determining this amount, you should consider her age, ability, disposition to labor, and habits of living and expenditures and disposition to save. If the husband of the deceased paid the expenses of her last illness and funeral expense, or has

obligated himself to pay them, you shall take this into consideration in determining amount of damages allowable.

You may not consider as an element of damages, the grief or anguish of the surviving relatives, including her husband and children, or the loss to the widower and children of the love and affection of the wife and mother and loss of the consolation of her presence in the family, or the pain and suffering of the deceased.

The amount of damages which you may allow, must not exceed the sum of \$15,000.00.” (Emphasis supplied.)

which was supported by citations and certified copies of instructions from *Draille v. Steele*, No. A-7101, Third Division, District Court for Alaska; and is set out complete as submitted in Appendix No. B. The Court refused to give the instruction requested, a ruling now claimed as error. (Tr. p. 32 Points on Appeal.)

The Court gave instructions numbered 3, 14, 15, 17, 18, objected to by Appellant (Tr. pp. 38, 39), and set out in full in Appendix C (See also Tr. pp. 21-25), all consistent with plaintiff’s theory, and well exemplified by instructions 14 and 15 as follows:

“14. If under the court’s instructions you find that plaintiff is entitled to a verdict, you will award such sum as, under all the circumstances of the case, *compensates the surviving husband and children of Martha Simmonds for the pecuniary loss they have suffered by reason of her death;*

provided, however, you may not return a verdict for plaintiff in excess of \$15,000.00.

15. In determining that pecuniary loss, you may consider not only the financial support, if any, which the decedent's husband and children would have received except for her death but also the pecuniary value of the society, comfort, care, protection and right to receive support, if any, which decedent's husband and children have lost by reason of the death. In weighing these matters you may consider the age of the decedent, and of decedent's husband and children; the state of health and physical condition of decedent and of decedent's husband and children as it existed at the time of the death and immediately prior thereto; their station in life; their respective expectancies of life as shown by the evidence; the disposition of the decedent, whether it was kindly, affectionate or otherwise; whether or not she showed an inclination to contribute to the support of her husband and children, or any of them; the earning capacity of the decedent and of her husband and children, and such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, comfort and protection, which decedent's husband and children might have expected to receive from the decedent had she lived. With respect to the matter of life expectancies, you must keep this point in mind: If you decide for plaintiff, the prospective periods of time that will be of concern to you in determining the pecuniary loss of each beneficiary is only the shorter of the life expectancies of the decedent and that beneficiary, because manifestly one could derive pecuniary benefit from

the life of the other only for the period that both would have lived." (Emphasis supplied.)

The grounds for urging our requested instruction, and for objecting to the given instructions, was stated to the Court thoroughly by pre-trial brief (the trial judge not being the judge that settled the pleadings), and recognized by the Court in its pre-trial opinion (See: Tr. pp. 15 to 19.) The grounds were identical with those urged on this appeal.

SPECIFICATION OF ERROR.

The District Court erred in holding that the Alaska Wrongful Death Statute (Chapter 89, SLA 1949, *supra*) permits recovery by the widower and minor children of their personal pecuniary loss, including the pecuniary value of society, comfort, care, protection and support, committing the same error in connection with each item noted in the appellant's points on appeal (Tr. pp. 32, 33.)

ARGUMENT.

SUMMARY.

The positions of appellant with reference to the points on appeal are these:

I. This Circuit by its decisions in the cases of *Jennings v. Alaska Treadwell Gold Mining Company* (CCA 9th 1909) 170 Fed. 146, 3 Alaska Fed. 350 and *The Princess Sophia* (CCA 9th

1932), 61 Fed. 2d 339 has established that the action created by the Alaska Wrongful Death Statute belongs to the administrator of the estate, irrespective of the survival of a spouse and/or children, and that the measure of damages is the loss to the estate.

II. The courts have uniformly applied the "loss to the estate" rule of damages under the Alaska Wrongful Death Statute in all cases, including those in which a spouse and/or children survived.

III. The re-enactment of the Wrongful Death Act, by the Legislature of Alaska in 1949 (Chapter 89), providing as its only change a raise in the recovery limit from \$10,000.00 to \$15,000.00, constitutes a legislative ratification of judicial interpretation then existing and is thereafter binding on the Courts.

I.

THIS COURT, BY ITS DECISIONS IN THE CASES JENNINGS v. ALASKA TREADWELL GOLD MINING CO. AND THE PRINCESS SOPHIA (SUPRA) HAS ESTABLISHED THAT THE ACTION CREATED BY THE ALASKA WRONGFUL DEATH STATUTE BELONGS TO THE ADMINISTRATOR OF THE ESTATE, IRRESPECTIVE OF THE SURVIVAL OF A SPOUSE AND/OR CHILDREN, AND THAT THE MEASURE OF DAMAGES IS THE LOSS TO THE ESTATE.

In an accident in the mine of the Alaska Treadwell Gold Mining Company located near Juneau, Alaska, two men were fatally injured. One of the men was named Linge. Two attorneys, R. W. Jennings and Z. R. Cheney sought administration of the estates,

Mr. Cheney becoming the administrator of the Linge estate, and Mr. Jennings the administrator of the other decedent. They each filed actions, as administrators, against the company; and each joined as counsel in each action. The first action tried is reported as *Linge's Administrator v. Alaska Treadwell Gold Mining Co.* (1st Div., 1906) 3 Alaska 9. The case was first appealed to this Court on a probate point reported as *Cheney v. Alaska Treadwell Gold Mining Co.* (CCA 9th, 1906) 148 Fed. 808, 2 Alaska Fed. 641; and upon retrial (unreported) again appealed to this Court on the point of liability (*Alaska Treadwell Gold Mining Company v. Cheney* (CCA 9th, 1908) 162 Fed. 593; 3 Alaska Fed. 142). Following the last appeal counsel brought on the second case, in which Mr. Jennings was administrator. No Alaska Court opinion is reported thereon; however, an appeal was taken because of an instructed verdict in favor of the defendant based upon a failure of proof that *anyone* suffered a pecuniary loss by reason of the death. *Jennings v. Alaska Treadwell Gold Mining Co.* (9th Cir. 1909) 170 Fed. 146, 3 Alaska Fed. 350.

The point on appeal is limited to the single question of damage. This Court in its opinion, after setting out the Alaska Statute, says, (p. 148):

“The Alaska Code of Civil Procedure is substantially the same as the Oregon Code of Civil Procedure, and Section 353 of the Alaska Code is identical with Section 381 of the Oregon Code (B. & C. Comp.), with the following exceptions: In the Alaska Code the amount that may be recovered ‘shall not exceed ten thousand dollars’; while in

the Oregon Code, the amount that may be recovered shall not exceed five thousand dollars. In the Oregon Code it is provided that: 'The amount recovered, if any, shall be administered as other personal property of the deceased person.'

In the Alaska Code there is a provision that: 'The amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife or children, when he or she leaves a husband, wife or children, him or her surviving.'

But that provision has no bearing on this case, as the deceased left no surviving wife or children. The next provision in the Alaska Code is: 'When he or she leaves no husband, wife or children, him or her surviving'—that in this case—'the amount recovered shall be administered as other personal property of the deceased person.'

This last provision, it will be observed, is identical with the Oregon Code.

In 1898, two years before the adoption of the Alaska Code by Congress, the section of the Oregon Code under consideration was brought before the Supreme Court of that state in the case of *Perham v. Portland Electric Co.*, 33 Or. 451, 53 P. 14, 24, 40 L.R.A. 799, 72 Am. St. Rep. 730. In an elaborate opinion upon this statute the Court refers to the construction placed upon the original Lord Campbell act passed by the British Parliament in 1846, the incorporation of this act in one form or another into the legislation of most of the states of the union, and the construction placed upon such statutes by the courts of the states. With respect to the beneficiaries under the Oregon act and the damages that may be recovered, the court said:

‘It is next claimed that the complaint is defective because it does not show that the deceased left surviving him any heirs, legatees, next of kin, or creditors. * * *

Under Lord Campbell’s act and similar statutes, the damages recovered belong to the designated beneficiary, and are measured by the value of the life taken to the particular person entitled to the benefit of the statute; while under our statute they belong to the estate, and are coextensive with the value of the life lost, without regard to its value to any particular person. In the one case the object of the action is to recover the pecuniary loss sustained by the designated relatives, and in the other the value of the life lost, measured, as near as can be, by the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life.’

The court continues: ‘It follows, therefore, that, so far as the right to maintain the action is concerned, it is immaterial whether the deceased left surviving him any relatives or creditors whatever. The right of action is given by the statute to the administrator or executor in his representative capacity, and is in the nature of an asset of the estate. The heirs, creditors, or distributees have no interest in the recovery on account of any right of action for the pecuniary injury sustained by them, but only by virtue of being creditors, or of kinship; and if the expense of the administration and debts of the deceased equal or exceed the assets, including the amount of the recovery, the next of kin would receive no benefit whatever from the right of action.’ * * *

It is true that the two statutes are not identical as a whole but the change in the Alaska Code from the Oregon Code makes more definite and certain the purpose of Congress to adopt the construction of the Supreme Court of Oregon for estates where the decedent left no husband, wife, or children. In such case the amount recovered should be administered as other personal property of the deceased person as provided in the Oregon Statute; that is to say, the amount received should be for the benefit of the estate, and the damage to the estate would therefore be the value of the life to the estate, measured by the earning capacity, thriftiness, and probable length of life of the deceased."

At this point, in considering the opinion, it should be noted that in both the *Cheney* case (supra) and the *Jennings* case (supra) the decedents were single men. The Court has said, above, relating to the statutory provision for distribution to the spouse and/or children (p. 148):

"But that provision has no bearing on this case as the decedent left no surviving wife or children."

If the Court had gone no further that opinion might not be binding on this appeal. But the Court set out an objection to testimony as to family (p. 150), then noted that the trial Court's theory was "the benefit to the estate rule", then considered as error (laying aside inconsistency) the Courts having ruled a failure of proof for want of a showing that any person suffered loss by the death (p. 150). The Court considered the

District of Columbia act, whereunder the action is to be “brought *in the name* of the administrator * * * and the damages recovered (shall) inure to the benefit of his or her family * * *; and the Maryland act whereunder “* * * such action shall be for the benefit of the husband, wife, parent and child * * * and shall be brought by and *in the name of the State of Maryland* * * *” (Opinion of *Stewart v. B. & O. Railroad*, 168 US 445, cited in the *Jennings* case). In this connection this Court said (p. 151):

“* * * But the two statutes differ very materially from the Alaska statute. In the former the amount recovered as damages does not become part of the assets of the estate, *while in the Alaska Code it does, and is administered as other personal property of the deceased person.*

We are of the opinion that the construction placed upon the statutes of Maryland and the District of Columbia by the Supreme Court is not applicable to the Alaska statute under consideration. Following the construction placed upon the Oregon statute by the Supreme Court of Oregon, we are of the opinion that the case should have been submitted to the jury with proper instructions upon the evidence as to the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life.”

Clearly here this Court has examined the Alaska act *as a whole*. The Maryland and District of Columbia acts are not only for the benefit of a named class, *but provide no right of recovery where persons of the named class do not survive*. (This also is the present

Alaska Act, see: Appendix A.) The Court determined that the Alaska Act creates *but one right or cause*, and that is for the benefit of the estate irrespective of survivorship; saying specially of the Alaska Act that the amount recovered as damages does become a part of the estate.

Judge Neterer of the Western District of Washington, Northern Division, in considering the exceptions to the rulings of the Commissioner, and in commenting on the rulings of the Commissioner, in *The Princess Sophia* (1929) 35 Fed. 2d 736, said of the Alaska Statute (at 738):

“This statute was construed by the Court of Appeals of this circuit in *Jennings v. Alaska Treadwell Gold Mining Co.*, 170 F. 146, 148, and adopted the construction of the Oregon Supreme Court in *Perham v. Portland Electric Co.*, 33 Or. 451, 53 P. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730. Judge Morrow said, in considering the measure of damages: ‘The Alaska Code of Civil Procedure is substantially the same as the Oregon Code * * * and section 353 (now 1185) of the Alaska Code is identical with section 381 of the Oregon Code * * * with the following exceptions: In the Alaska Code the amount that may be recovered ‘shall not exceed \$10,000.00’, while in the Oregon Code the amount that may be recovered ‘shall not exceed \$5,000.00.’ ”

And states the rule: ‘In such case the amount recovered should be administered as other personal property of the deceased person as provided in the Oregon statute; that is to say, the amount received should be for the benefit of the estate and the damage to the estate would therefore be the

value of the life to the estate, measured by the earning capacity, thriftiness, and probable length of the life of the deceased.' ”

The Court then goes on to illustrate (p. 738):

“There is a distinction in the nature and measure of damages to the injured person, or right given to the surviving spouse of dependents, or a statutory right for the benefit of the estate * * * In the second, loss to the beneficiary, which would include loss to the named person by way of contribution, support, including elements which may not be approximated in money, such as love and affection, aside from the financial loss; third, to the estate, where it is made as nearly as may be to the financial returns which could reasonably be expected, what investments or savings have been effected during the lifetime, the reasonable expectancy or certainty of continued savings, and, giving consideration to his age, health, habits, disposition, and capacity to labor and to save, what would he likely have provided for an estate had he lived the life expectancy. See *Holmes v. O. & C. Ry. Co.*, supra; *Kelley v. Cent. R. R. of Iowa* (C.C.) 48 F. 663; *In re California Nav. & Imp. Co.* (D. C.) 110 F. 670.”

With this fundamental concept of the statute in mind, *from the construction thereof by this Court in the Jennings case*, Judge Neterer goes on to dispose of particular points, one of which was exceptions to the claims of heirs, to which is said (p. 740):

“(5, 6) The exceptions to the claims of heirs allowed by the Commissioner must be sustained (see (3) in margin). The right of recovery is

given to the personal representatives of the estate by the statute. No common-law right of action to the heirs is available. The right of action, being given to the administrator or executor in his representative capacity, *is in the nature of an asset of the estate. Heirs have no interest in the recovery on account of any right of action for pecuniary injury sustained by them.* Perham v. Portland Gen. Electric Co., 33 Or. 451, 53 P. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730. To the same effect is Carlson v. Oregon Short Line, 21 Or. 450, 28 P. 497; see, also Jennings v. Alaska Treadwell Gold Mining Co. (C.C.A.) 170 F. 146.” (Emphasis supplied.)

And, in relation to the findings on damages, the Court said (p. 740)

“What has been said with relation to the rule of recovery forces the conclusion that under the Alaska statute *increased costs of living to the widow*, Drowne v. Great Lakes Transit Corp’n (C.C.A.) 5 F. (2d) 58, comfort, love, consolation, and affection to the bereft, the financial responsibility of the petitioner, equal distribution of justice, or dictates of humanity would not warrant the court in finding a pecuniary loss where none is shown by the evidence. The court could not in good conscience say that a party 35, 40, 50, or 60 years of age, or any age, who has not shown some result of saving and saving habit and position of expectancy, in all reasonable probability, would leave an estate of present worth at the end of life expectancy. Health, earning capacity, and employment, contributions to charity, or ‘living well’, being a ‘good fellow’, without some evidence of accumulation and saving habit does not

create a presumption of itself to support such finding.” (Emphasis added.)

The commissioner’s report is not available for study; however, it would be a safe assumption that among the claims filed and allowed relating to the loss of about 350 lives in this terrible disaster must have been many by administrators where a spouse and/or children survived. And there appears to be no question but that the proceeding was bitterly contested at each step by competent counsel. Indeed, the comment by Judge Neterer on the distinction between the “loss to the beneficiary” rule and the “loss to the estate” rule leaves no doubt but that not only were there claims in which a spouse or child survived, but that also counsel raised particularly the applicable rule with respect thereto.

This Court reviewed the opinion of Judge Neterer, as well as an extremely voluminous record, in close detail as appears from this Court’s opinion, (*The Princess Sophia* (C.C.A. 9th (1932) 61 Fed. 2d 339.) The Court discussed all of the errors, except one, even though it felt to do so unnecessary in view of the holding on “limitations of liability”. All of the District Court’s rulings on the interpretation of the Alaska Wrongful Death Statute were sustained. This Court on page 354 states:

“(28) The one assignment of error not passed upon is the one relating to the holding and finding of court *that the evidence was not sufficient to sustain the commissioner’s findings*, and award of damages in favor of a hundred or more

claimants in the amounts set forth in the commissioner's reports. The court held that the *evidence* did not *prove* any *pecuniary loss to any of the estates suing*, and consequently, under the Alaska Statute noted in the margin no recovery was allowable." (Emphasis supplied.)

The Court laid aside this error as "moot" in view of the practical nonexistence of a fund out of which to pay the claims. The very detail with which the Court considered *all* of the other issues in the case is so impressive that one is forced to the conclusion that this Court is in full accord with the *principles* upon which it was ruled the evidence did not show a pecuniary loss to the estates (even though at least in one a widow survived as appears from Judge Neterer's opinion), and by the foregoing statement intended to pass only the *task* of examining the *evidence* in the record relating to the hundred or more claims wherein the *sufficiency of the evidence* to support the ruling was claimed as error.

The ruling of this Court in *The Princess Sophia* has been looked upon as a ratification of the *Jennings* case; and those cases as establishing that the Alaska Wrongful Death Statute creates only one cause of action: a right of the administrator to recover for the estate the loss to the estate in accumulation of savings lost by the death, all apart from any consideration of survival by a spouse or children, or any pecuniary loss to dependents or family.

II.

THE COURTS HAVE UNIFORMLY APPLIED THE "LOSS TO THE ESTATE" RULE OF DAMAGES UNDER THE ALASKA WRONGFUL DEATH STATUTE, IN ALL CASES, INCLUDING THOSE IN WHICH A SPOUSE AND/OR CHILDREN SURVIVED.

In addition to the Circuit Court holdings in *Jennings v. Alaska Treadwell Gold Mining Co.* and *The Princess Sophia* (supra) the Courts in Alaska have commented on the Wrongful Death Statute in the following cases in which opinions have been written:

Linge's Administrator v. Alaska Treadwell Gold Mining Co. (1st Div. 1906) 3 Alaska 9;

Caswell v. Copper River and N. W. Ry. (3rd Div. 1913) 4 Alaska 709;

Kriedler v. Ketchikan Spruce Mills (1st Div. 1943) 10 Alaska 365.

An interesting thing about the *Linge's Administrator* case, supra, is that it went to the Ninth Circuit twice, as is apparent from the opinion of the Ninth Circuit in *Alaska Treadwell Gold Mining Co. v. Cheney* (1908) 162 Fed. 593, 3 Alaska Fed. 142, in connection with which the second appeal opened the suit for review of its merits. A close examination of the opinion of the Ninth Circuit shows that the ruling of the Court below with respect to the measure of damages (as no doubt exemplified in the instructions given) was not claimed as error.

The case of *Caswell v. Copper River and N. W. Ry.* (supra) did not involve children or a spouse. The Court was considering a motion directed to the plead-

ings. Pertinent thereto, and to the point in this case, is the Court's statement on page 712:

"As to the ground set up in the third paragraph of defendant's motion to make more definite and certain, in that the plaintiff be required to state the number of remittances made by deceased to his mother, and what amounts were so remitted, and in what way or manner the said mother was largely dependent on deceased for support, it would seem that the allegations of the complaint with respect to such matters are immaterial, in view of the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Jennings v. Alaska Treadwell Gold Mining Co.* 170 Fed. 146, 95 C.C.A. 388, in which the court quotes with approval the following language from the case of *Perham v. Portland Electric Co.*, 33 Or. 451, 53 Pac. 14, 24, 40 L.R.A. 799, 72 Am. St. Rep. 730 as follows:

'It follows, therefore, that, so far as the right to maintain the action is concerned, it is immaterial whether the deceased left surviving him any relatives or creditors whatever. The right of action is given by the statute to the administrator or executor in his representative capacity, and is in the nature of an asset of the estate. The heirs, creditors, or distributees have no interest in the recovery on account of any right of action for the pecuniary injury sustained by them, but only by virtue of being creditors, or of kinship; and if the expense of the administration and debts of the deceased equal or exceed the assets, including the amount of the recovery, the next of kin would receive no benefit whatever from the right of action.' "

In the case of *Kriedler v. Ketchikan Spruce Mills* (1st Division 1943), *supra*, the Alaska Court again considers damage in wrongful death cases, and the Court at page 367 said:

“This section of our statute was taken from the Oregon Code, and the measure of damages laid down by the Oregon Supreme Court in the early case of *Carlson v. Oregon Short Line & U. N. Ry. Co.*, 21 Or. 450, 28 P. 497, is still followed:

(1) In actions brought under this section, the true measure of damages, as stated in that case ‘is the pecuniary loss suffered by the estate, without any solatium for the grief and anguish of surviving relatives or pain or suffering of the deceased; and that loss would be what the deceased would have probably *earned* by his *intellectual* or *bodily* labor in his *business* or *profession* during the residue of his life, and which, as representing his net savings, would have gone for the benefit of his estate, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditures. *Carlson v. Oregon S. L. & U. N. Ry. Co.*, 21 Or. 450, 28 P. 497, 499, *Gabrielson v. Dixon*, 133 Or. 567, 291 P. 494, 495.’”

The main point in the *Kriedler* case was the Court’s concern with fixing the amount of the loss under the evidence before it, it being contended on the one hand that the award should be “nominal”, considering the decedent’s age and very modest savings. The Court, however, found the decedent frugal, busy, just escaping a long national depression, just emerging into an area of higher wages, *and a man who had raised a fam-*

ily, and accordingly felt that in view of all the facts, he would likely have saved \$1,600.00 in the rest of his life.

The opinion in the *Kriedler* case clearly shows that children survived; and no distinction was made by the Court in the rule on account thereof.

There is reported a ruling of Judge Diamond in *Draille v. Steele* (3rd Div. 1952) 13 Alaska 680, a case involving a surviving spouse and child, in which the pleader adopted the same theory as Appellee in this case. Judge Diamond in the written opinion overruled motions addressed to the pleading; however, as is evident from the instructions given (Appendix B) Judge Diamond reversed that ruling at the trial. The case was retried, the verdict having been set aside on another point, and Judge McCarey therein followed the instructions used by Judge Diamond. (Appendix B).

Accordingly, all of the Courts have consistently followed the rule of the *Jennings* case (*supra*) construing our statute as creating but *one* cause of action: a right in the administrator to recover the loss to the estate, unaffected by any loss to survivors.

III.

THE RE-ENACTMENT OF THE WRONGFUL DEATH ACT, BY THE LEGISLATURE OF ALASKA IN 1949 (CHAPTER 89), PROVIDING AS ITS ONLY CHANGE A RAISE IN THE RECOVERY LIMIT FROM \$10,000.00 TO \$15,000.00 CONSTITUTES A LEGISLATIVE RATIFICATION OF JUDICIAL INTERPRETATION THEN EXISTING AND IS THEREAFTER BINDING ON THE COURTS.

The Court in the *Jennings* case said (p. 149):

“A statute adopted from another state, which has been construed by the highest court thereof is presumed to be adopted with the construction thus placed upon it. * * * (quoting cases).”

This principle rests on the reasoning that the legislature knew of the construction thereof by the Courts, and intended to adopt the construction as well as the language of the act.

When an act of the legislature is re-enacted, without change of the part in point, the same rule of intention, with the force of a presumption, is applied thereto with respect to prior judicial opinion.

Shapiro v. United States, 335 U.S. 1, 68 Sup. Ct. 1375, 92 L. Ed. 1787;

Lindeman v. State Indust. Accid. Com., 183 Ore. 245, 192 P. (2d) 732;

Overland v. Jackson, 128 Ore. 455, 275 P. 21.

The legislature must be deemed to have so considered its 1949 act, for in re-enacting the statute in 1953 (See Appendix A) it not only changed the language completely by making the action for the benefit of

named persons, *but limited action to those in which persons of the named class survived*, and specifically spelled out the elements of damage. Such carefully spelled out changes in such specific language is only consistent with a Legislative intent to create a marked change in what it understood the old act to be.

The "highest" Court in the Territory, and a branch of government on equal footing with the Legislature of the Territory is our District Court. Even though this be a trial Court, and its judgments subject to review by this Circuit Court, nonetheless the decisions of the District Court by the force of circumstances in a Territory should be presumed to be within the knowledge of the Legislature. In this light the *Kriedler* case (supra) becomes a foundation stone for the interpretation of the 1949 act.

In this instance we have an Act of Congress passed in 1900, not only interpreted by this Court in the *Jennings* case, and *The Princess Sophia* (supra), but by the District Courts in Alaska, notably in the *Kriedler* case (supra) in its 53 years of unchanged wording. During this period there can be no question but that the statute has been considered often by counsel, and by the trial Courts in death cases. In all these there is no intimation that the act was ever viewed as creating anything other than a right to recover for the loss to the estate by the Courts.

When the legislature in 1949 re-enacted this law they must therefore have intended to ratify the rule

of recovery measured by the loss to the estate. The generally understood meaning of the act, for such a great number of years, without intimation of dissent, by the people of Alaska, no doubt influenced the 1949 legislature in its consideration of changes in the act.

The first intimation of contrary thought by counsel is in the *Draille* case (supra). From Judge Diamond's opinion it is clear the point raised was fully and sympathetically considered, and by a well loved humanitarian gentleman. This Court cannot but doubt that Judge Diamond did not easily change his mind. The only thing that could have caused this eminent legal scholar to reverse his ruling is a well founded conclusion that the matter had been settled by this Court in the *Jennings* and *Princess Sophia* cases. No doubt also Judge Diamond's years in Congress lead him to respect the effect of the re-enactment of this act by our legislature in 1949, in the light of this Court's decisions, and the *Kriedler* case.

In 1953, the Alaska Legislature radically changed the Act (See Appendix A). The Alaska Legislature keeps no minutes of its committee proceedings, or any transcript of its legislative sessions; and so we have no reference material from which to determine precisely the legislative thought in either 1949 or 1953. But the sweeping changes in the 1953 Act speak for themselves.

The legislature in 1953 limited the death action sharply to those cases where spouse, children, grand-

children or parent survive. It cut out completely the estates of those who die surviving their parents and single. Perhaps this is a social recognition that the hardy, free roving, tie-less band of "Pioneers" so well remembered in Alaska are becoming extinct. And that the "savings", by limiting recoveries to those normally dependent upon the decedent, justified, in a small measure, the unequivocal mandate that recovery thereafter be measured by the loss to the named beneficiary. Indeed it is rare that statutes be so precise, as is the 1953 Act, to the point of a virtual draft of instructions to the jury.

While the 1953 Act is not in all respects clear, and may well require judicial interpretation, nonetheless its distinctly different character from the prior Acts evidence a knowledge by the legislature in 1949 that it was perpetuating a "loss to the estate" type of statute.

CONCLUSION.

The interpretation of the Alaska Wrongful Death Statute in the instant cause has been settled by this Court's decision; and the more than 55 years understanding thereof by the bench and bar, ratified by the legislative re-enactment of 1949. This cause should be reversed and remanded for trial in accordance with

the law as expressed in Defendant's Requested Instruction No. 1.

Respectfully submitted,

CHARLES J. CLASBY,

Attorney for Appellant.

COLLINS, CLASBY & SCZUDLO,

Of Counsel.

Service acknowledged by receipt of a copy this 11 day of September, 1956.

ROBERT A. PARRISH,

Attorney for Appellee.

(Appendices A, B and C Follow.)

Appendices.



Appendix A

“CHAPTER 153

AN ACT

Relating to damages in actions for wrongful death; amending Sec. 61-7-3, ACLA, 1949, as amended by Ch. 89, SLA, 1949.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Section 61-7-3 ACLA 1949, as amended by Chapter 89, Session Laws of Alaska, 1949, is hereby amended to read as follows:

Sec. 61-7-3. *Action for Wrongful Death: Disposition of Amount Recovered.* When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed fifty thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife or children, him or her surviving; or leaving no husband, wife or children surviving them and in that event, for the benefit per capita of the child or children of the decedent's child or children, if any, and the surviving parent or parents of the decedent. When the Plaintiff prevails, the trial court shall

determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.

The damages recoverable under this Act shall be limited to those which are the natural and proximate consequences of the negligent or wrongful act or omission of another.

In fixing the amount of damages to be awarded under this Act, the Court or jury shall consider all the facts and circumstances and from them fix the award at such sum as will fairly compensate for the injury resulting from the death. In determining the amount of the award, the Court or jury shall consider but is not limited to the following:

- (1) Deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to the age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during his lifetime.

- (2) Loss of contributions for support.

- (3) Loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries.

- (4) Loss of consortium.

- (5) Loss of prospective training and education.

- (6) Medical and funeral expenses.

The death of a beneficiary or beneficiaries before judgment shall not affect the amount of damages recoverable hereunder.

The right of action hereby granted shall not be abated by the death of a person named or to be named the defendant.

Approved March 28, 1955."

Appendix B

In the District Court of the District of Alaska
Fourth Division

No. 7524

SAMUEL SIMMONDS, Administrator of
the Estate of Martha Simmonds, De-
ceased, and for the benefit of Samuel
Simmonds, and the children of the
deceased, namely, Leona Simmonds,
Nellie Simmonds, Doreen Simmonds,
Eli Simmonds, Margaret Simmonds
and Arnold Simmonds,

Plaintiffs,

vs.

WIEN ALASKA AIRLINES, INC.,

Defendant.

DEFENDANT'S REQUESTED INSTRUCTION NO. 1

If you find for the plaintiff and against the defend-
ant in this action, you must then determine the amount
of damages which you believe the plaintiff is entitled
to recover from the defendant. The true measure of
damages in such event is the pecuniary loss suffered
by the estate. Such loss would be what the deceased
would probably have earned by her intellectual or
bodily effort of labor in her business or profession
during the remainder of her life, which, to the extent

of her net savings would have gone for the benefit of her estate. In determining this amount, you should consider her age, ability, disposition to labor, and her habits of living and expenditures and disposition to save.

If the husband of the deceased paid the expenses of her last illness and funeral expenses, or has obligated himself to pay them, you shall take this into consideration in determining the amount of damages allowable.

You may not consider as an element of damages, the grief or anguish of the surviving relatives, including her husband and children, or the loss to the widower and children of the love and affection of the wife and mother and loss of the consolation of her presence in the family, or the pain and suffering of the deceased.

The amount of damages which you may allow, must not exceed the sum of \$15,000.00.

See:

(1) Instruction No. 8 given by Judge Diamond in *Dralle v. Steele*, No. A-7101 3rd Division; note certified copy attached, and the complete file in this Court's Clerk's office, and survival therein of a widow and child.

(2) Instruction No. 8 given by Judge McCarey in *Dralle v. Steele*, No. A-7101 3rd Division; note certified copy attached, and the complete file in this Court's Clerk's office, and survival therein of a widow and child.

(3) *The Princess Sophia* (W.D. Wn. N. D. 1929) 35 Fed 2d 736, affirmed 9th Circuit, 1923, 61 Fed 2d 339. Survivors included spouse and children; and the District Court established the above rule as the *sole measure*, irrespective of survivors. This point not directly raised on appeal on *allowed claims*, and no indication exists in the appeal that it was raised with respect to the following part of the District Court's opinion:

740 "What has been said with relation to the rule of recovery forces the conclusion that under the Alaska Statute increased costs of living *to the widow*, *Drowne v. Great Lakes Transit Corp.* (CCA) 5 F 2 58, comfort, love, consolation, and affection to the benefit, the financial responsibility of the petitioner, equal distribution of justice, or dictates of humanity would not warrant the court in finding a pecuniary loss where none is shown by the evidence. The Court could not in good conscience say that a party 35, 40, 50 or 60 years of age, or any age, who has not shown some result of saving and saving habits and position of expectancy, in all reasonable probability, would have an estate of present worth at the end of life expectancy, health, earning capacity, and employment, contributions to charity, or 'living well', being 'a good fellow', without some evidence of accumulations and saving habit, does not create a presumption of itself to support such finding."

(4) *Kreidler v. Ketchikan Spruce Mills* (1st Div., 1943) 10 Alaska 365. The Court in its opinion in that case said:

367 "In actions brought under this section, the true measure of damages, as stated in that case,

‘is the pecuniary loss suffered by the estate, without any solatium for the grief and anguish of surviving relatives or pain or suffering of the deceased; and that loss would be what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of this life, and which, as representing his net savings, would have gone for the benefit of his estate, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditures.’ ”

369 “We do know, however, from the allegations of the Complaint, that the deceased had a family of four children. . . .”

372 “That the damage to his estate, caused by his untimely death through the negligence of the defendant, measured by the value of deceased’s life to the estate, based on his earning capacity, thriftiness, and probable length of life of the deceased, is \$1,600 and that such amount shall be exclusively for *the benefit of the decedent’s children*, and must be distributed by the plaintiff as if it were unbequeathed assets left in his hands after payment of all debts and expenses of administration.”

(5) Chapter 89, Session Laws of Alaska, 1949.

(6) Plaintiffs’ Briefs filed herein.

(7) Smith v. Pacific Alaska Airways, No. 3763, Instruction 15. Mahon v. Pacific Alaska Airways No. 3772, Instruction 15.

Respectfully submitted,

Collins & Clasby,

By /s/ Chas J. Clasby,

Attorneys for Defendant.

In the District Court for the Territory of Alaska
Third Division

No. A-7101

Vivian Dralle, Administratrix of the
Estate of Herbert Dralle, deceased,
Plaintiff,

vs.

Charles Steele, doing business as Radio
Cab Company,
Defendant.

INSTRUCTIONS TO THE JURY

8.

If you find for the plaintiff and against the defendant in this action you must then determine the amount of damages which you believe the plaintiff is justly entitled to recover from the defendant. The true measure of damages in such event is the pecuniary loss suffered by the estate. Such loss would be what deceased would probably have earned by his intellectual or bodily efforts of labor in his business or profession during the remainder of his life, which to the extent of his net savings would have gone for the benefit of his estate. In determining this amount you should consider his age, ability, disposition to labor, and his habits of living and expenditures, and disposition to save.

If the wife of the deceased paid the expenses of his last illness and funeral expenses or has obligated herself to pay them, you shall take this into consideration in determining the amount of damages allowable.

You may not consider as an element of damages the grief or anguish of surviving relatives, *including his wife and child* or the loss to the widow and child of the love and affection of the husband and father and loss of the consolation of his presence in the family, or the pain and suffering of the deceased.

The amount of damages which you may allow must not exceed the sum of \$15,000.00.

Filed in the District Court, Territory of Alaska,
Third Div., Oct. 29, 1952.

M. E. S. Brunelle, Clerk,
By Ruth Lamp, Deputy.

In the District Court of the District of Alaska
Fourth Judicial Division

United States of America)	
District of Alaska)	ss.
Fourth Judicial Division)	

CERTIFICATE

I, John B. Hall, Clerk of the District Court of the District of Alaska, Fourth Judicial Division, do hereby certify that the foregoing and hereto attached two page(s) of typewritten matter, constitute(s) a full, true, and complete copy, and the whole thereof, of the Instructions to the Jury, No. 8, In Cause No. A-7101 entitled Vivian Dralle, Administratrix of the Estate of Herbert Dralle, deceased, Plaintiff, vs. Charles Steele, doing business as Radio Cab Company, Defendant.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled Court this 2nd day of December, 1955.

(Seal)

John B. Hall, Clerk,
By /s/ C. I. Hilgendorf,
Deputy.

In the District Court of the District of Alaska
Third Division

—
No. A-7101
—

Vivian Dralle, Administratrix of the
Estate of Herbert Dralle, deceased,
Plaintiff,

vs.

Charles Steele, doing business as Radio
Cab Company,
Defendant.

INSTRUCTIONS TO THE JURY

8.

If you find for the plaintiff and against the defendant in this action you must then determine the amount of damages which you believe the plaintiff is justly entitled to recover from the defendant. The true measure of damages in such event is the pecuniary loss suffered by the estate. Such loss would be what deceased would probably have earned by his intellectual or bodily efforts of labor in his business or profession during the remainder of his life, which, to the extent of his net savings would have gone for the benefit of his estate. In determining this amount you should consider his age, ability, disposition to labor, and his habits of living and expenditures, and disposition to save.

If the wife of the deceased paid the expenses of his last illness and funeral expenses or has obligated herself to pay them, you shall take this into consideration in determining the amount of damages allowable.

You may not consider as an element of damages the grief or anguish of surviving relatives, *including his wife and child* or the loss to the widow and child of the love and affection of the husband and father and loss of the consolation of his presence in the family, or the pain and suffering of the deceased.

The amount of damages which you may allow must not exceed the sum of \$15,000.00.

Filed in the District Court, Territory of Alaska,
Third Div., Feb. 11, 1954.

Wm. A. Hilton, Clerk,
By Ruth Lamp, Deputy.

In the District Court of the District of Alaska
Fourth Judicial Division

United States of America)	
District of Alaska)	ss.
Fourth Judicial Division)	

CERTIFICATE

I, John B. Hall, Clerk of the District Court of the District of Alaska, Fourth Judicial Division, do hereby certify that the foregoing and hereto attached two page(s) of typewritten matter, constitute(s) a full, true, and complete copy, and the whole thereof, of the Instructions to the Jury, No. 8, In Cause No. A-7101 entitled Vivian Dralle, Administratrix of the Estate of Herbert Dralle, Deceased, Plaintiff vs. Charles Steele, doing business as Radio Cab Company, Defendant.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled Court this 2nd day of December, 1955.

John B. Hall, Clerk,
By /s/ C. I. Hilguidorf,
Deputy.

Appendix C

In the District Court for the District of Alaska
Fourth Division

No. 7524

SAMUEL SIMMONDS, Administrator of
the Estate of Martha Simmons, De-
ceased, and for the benefit of Samuel
Simmonds, and the children of the
deceased, namely, Leona Simmons,
Nellie Simmons, Doreen Simmons,
Eli Simmons, Margaret Simmons
and Arnold Simmons,

Plaintiffs,

vs.

WIEN ALASKA AIRLINES, INC.,

Defendant.

INSTRUCTIONS TO THE JURY

3. The following matters are to be considered as having been established in this action, either by stipulation of the parties or by uncontradicted testimony:

The plaintiff, Samuel Simmons, is the duly appointed, qualified and acting administrator of the estate of Martha Simmons. On October 10, 1951, the defendant, Wien Alaska Airlines, was a common carrier operating an airline, and on that day Martha Simmons was a passenger for hire on one of defendant's aircraft on a flight from Meade River Coal Mine to Point Barrow. This aircraft, which was under the

exclusive control and management of the defendant, crashed near the village of Barrow, killing Martha Simmonds and the pilot, George Harrington, who was a duly licensed pilot.

Martha Simmonds is survived by her husband Samuel Simmonds, and six children, Leona Simmonds, Nellie Simmonds, Doreen Simmonds, Eli Simmonds, Margaret Simmonds and Arnold Simmonds.

14. If under the court's instructions you find that plaintiff is entitled to a verdict, you will award such sum as, under all the circumstances of the case, compensates the surviving husband and children of Martha Simmonds for the pecuniary loss they have suffered by reason of her death; provided, however, you may not return a verdict for plaintiff in excess of \$15,000.

15. In determining that pecuniary loss, you may consider not only the financial support, if any, which the decedent's husband and children would have received except for her death, but also the pecuniary value of the society, comfort, care, protection and right to receive support, if any, which decedent's husband and children have lost by reason of the death. In weighing these matters you may consider the age of the decedent and of decedent's husband and children; the state of health and the physical condition of the decedent and of decedent's husband and children as it existed at the time of the death and immediately prior thereto; their station in life; their respective expectancies of life as shown by the evidence; the disposition of the decedent, whether it was kindly, affectionate or otherwise; whether or not she showed an

inclination to contribute to the support of her husband and children, or any of them; the earning capacity of the decedent and of her husband and children, and such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, comfort and protection, which decedent's husbands and children might have expected to receive from the decedent had she lived. With respect to the matter of life expectancies, you must keep this point in mind: If you decide for plaintiff, the prospective periods of time that will be of concern to you in determining the pecuniary loss of each beneficiary is only the shorter of the life expectancies of the decedent and that beneficiary, because manifestly one could derive pecuniary benefit from the life of the other only for the period that both would have lived.

17. The right of one person to receive support from another is not destroyed by the fact that the former does not need the support, nor by the fact that the latter has not provided it, and even if one or both of those conditions have existed, the mere right to receive support may have a pecuniary value and thus may be the basis of assessing damages against one who negligently has caused the death of the person from whom the support was due.

18. If you return a verdict for plaintiff, it shall be for a single sum, representing the aggregate of the pecuniary loss suffered by decedent's husband and children. In other words, if you return a verdict for plaintiff, you will not allocate the damages among decedent's husband and children.

No. 15,149

United States Court of Appeals
For the Ninth Circuit

WIEN ALASKA AIRLINES, INC.,
Appellant,

vs.

SAMUEL SIMMONDS, Administrator of
the Estate of Martha Simmonds,
Deceased, for the benefit of Samuel
Simmonds, and the children of the
Deceased, namely, Leona Simmonds,
Nellie Simmonds, Doreen Simmonds,
Eli Simmonds, Margaret Simmonds
and Arnold Simmonds,

Appellee.

BRIEF FOR APPELLEE.

ROBERT A. PARRISH,
544½ Second Avenue, Fairbanks, Alaska,
Attorney for Appellee.

FILED

NOV -4 1956

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Statement of case	1
Summary of arguments	2
Argument I	3
Argument II	11
Wrongful death statutes	11
Alaska wrongful death statute	14

Table of Authorities Cited

Cases	Pages
Carlson v. Ore. Short Line & U.N. Ry. Co., 21 Ore. 450, 28 P. 497	13, 18
Caswell v. Copper River and N. W. Ry., 4 Alaska 709 (1913)	17
Dralle v. Steele, 1952, 13 Alaska 680	19
Hamilton v. Erie R. Co. (1916), 219 N.Y. 343, 114 N.E. 399	19
Hansen v. Hayes, 154 P. 2d 202	11
Jennings v. Alaska Treadwell Gold Mining Co. (C.C.A. 9th, 1909), 3 Alaska Fed. 350, 170 Fed. 146	15, 17
Koske v. Alaska Juneau Gold Mining Co., 6 Alaska 334	17
Kreidler v. Ketchikan Spruce Mills, 10 Alaska 365	18
Meekin v. Brooklyn Heights Ry. Co. (1900), 164 N.Y. 145, 58 N.E. 50, 51 L.R.A. 235	20
Parham v. Portland Electric Co., 33 Ore. 451, 53 P. 14, 40 L.R.A. 799, 72 Am. St. Rep. 730	13, 16
The Princess Sophia, 35 F. 2d 736	11, 19
United States v. Standard Oil Company of California, 21 F. Supp. 645, District Court, S.D., California, N.D., Dec. 4, 1937	6, 11
Wilcox v. Bierd et al., 162 N.E. at page 174, Sec. 2	12

Statutes

Act of June 6, 1900, 31 Stat. 392	14
Alaska Code of Civil Procedure, Section 353	14
Alaska Compiled Laws Annotated, 1949:	
Section 19-1-1	8, 10
Section 61-7-3	2, 14

TABLE OF AUTHORITIES CITED

iii

	Pages
Compiled Laws of Alaska, 1933, Section 3845	18
Lord Campbell's Act, 1846, 9 and 10 Viet. C. 93	12
Oregon Code, 1920, Section 380	13
1 Oregon Compiled Laws, Section 8-903	11, 17
Session Laws of Alaska, 1947, Chapter 18, 1, p. 600	11
Session Laws of Alaska, 1949, Chapter 89	14
Session Laws of Alaska, 1955, Chapter 153	2, 3

Texts

Cooley's Blackstone, 3rd Ed., Vol. 1, pp. 85-86	5
---	---

No. 15,149

**United States Court of Appeals
For the Ninth Circuit**

WIEN ALASKA AIRLINES, INC.,
Appellant,
vs.

SAMUEL SIMMONDS, Administrator of
the Estate of Martha Simmonds,
Deceased, for the benefit of Samuel
Simmonds, and the children of the
Deceased, namely, Leona Simmonds
Nellie Simmonds, Doreen Simmonds,
Eli Simmonds, Margaret Simmonds
and Arnold Simmonds,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

The statement of the case of the appellant is substantially correct but it might not be amiss to add the following:

In 1955 the statute relating to wrongful death was amended and is quoted as Appendix A of appellant's brief. The amount recoverable was changed to \$50,000.00 and the statute specifically provided for

the introduction of evidence as to the accumulation, contributions for support, loss of assistance or service, loss of consortium, prospective training and education, and medical and funeral expenses, although this statute did not specifically limit the court to such evidence.

The appellee moved to apply the 1955 statute. The court denied the motion insofar as the amount was concerned. The question of the applicability of the new statute on evidential grounds was not raised.

The court held that under the prior statute the instruction given was applicable. The question therefore, which is principal in this case, is whether or not the proper measure of damages, either under the new statute or the old statute, is limited to what the deceased would probably have earned by her intellectual or bodily effort or labor in her business or profession during the remainder of her life which, to the extent of her net savings, would have gone to the benefit of her estate.

SUMMARY OF ARGUMENTS.

The position of the appellee is:

I. that the wrongful death statute, 61-7-3, A.C.L.A., as amended in 1955 by Chapter 153, Session Laws of Alaska, is applicable to wrongful death actions pending at the time of its enactment; and

II. that even if the statute as amended in 1955 did not apply to this action, the court was

still correct in applying the measure of damages outlined in its Instruction No. 15 (Transcript Record page 24).

ARGUMENT I.

Chapter 153 of the Session Laws of Alaska, 1955, provides as follows:

“CHAPTER 153

An Act; relating to damages in actions for wrongful deaths; amending Sec. 61-7-3, A.C.L.A. 1949, as amended by Chap. 89, S.L.A. 1949.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Section 61-7-3, A.C.L.A. 1949, as amended by Chapter 89, Session laws of Alaska, 1949, is hereby amended to read as follows:

Sec. 61-7-3. Action for Wrongful Death: Disposition of amount recovered. When the death of a person is caused by wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed fifty thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife or children, him or her surviving; or leaving no husband, wife

or children surviving then and in that event, for the benefit per capita of the child or children of the decedent's child or children, if any, and the surviving parent or parents of the decedent. When the Plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.

The damages recoverable under this Act shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.

In fixing the amount of damages to be awarded under this Act, the Court or jury shall consider all the facts and circumstances and from them fix the award at such sum as will fairly compensate for the injury resulting from the death. In determining the amount of the award, the Court or jury shall consider but is not limited to the following:

(1) Deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to the age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during his lifetime.

(2) Loss of contributions for support.

(3) Loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries.

(4) Loss of consortium.

(5) Loss of prospective training and education.

(6) Medical and funeral expenses.

The death of a beneficiary or beneficiaries before judgment shall not affect the amount of damages recoverable hereunder.

The right of action hereby granted shall not be abated by the death of a person named or to be named the defendant.

Approved March 28, 1955''.

At the risk of being elementary, the nature and facts of statutes should be reviewed. We quote from Cooley's Blackstone, 3rd Ed., Vol. 1, pp. 85-86:

"Statutes also are either 'declaratory' of the common law, or 'remedial' of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper 'in perpetuum rei testimonium', and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been.

Remedial statutes are those which are made to supply such defects and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into 'enlarging' and 'restraining' statutes.

. . . The rules to be observed with regard to the construction of statutes are principally these which follow.

There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy.”

The signal case defining the place of damages in a cause of action is *United States v. Standard Oil Company of California*, 21 F. Supp. 645, District Court, S.D., California, N.D., Dec. 4, 1937. The case was affirmed by the Ninth Circuit Court of Appeals in 107 F. 2d 402. Certiorari was denied by the United States Supreme Court 307 U.S. 673; petition for re-hearing denied 309 U.S. 697. Plainly, any constitutional question was thoroughly examined.

At page 660, 21 F. Supp., the argument of the Government was set forth wherein the right to receive interest from the date of conversion of property was claimed as a vested right immune from statutory interference. The court said:

“. . . No constitutional structure can be erected upon a remedy or part of a remedy, such as interest, the allowance of which, at common law, was discretionary. What is discretionary cannot be set up as a right, so as to withstand legislative change.

“(230-28) The argument to the contrary overlooks the place of damages in a cause of action. At the risk of being elementary, it is well to define certain terms—the more so as they have been, at times, a source of confusion. The right of action is merely the right to pursue a remedy. The cause of action is the concurrence of the facts which give rise to an enforceable claim.

“As said in *Hutchinson v. Ainsworth*, 1887, 72 Cal. 452, 15 P. 82, 84, 2 Am. St. Rep. 823: ‘The facts upon which the plaintiff’s right to sue is based, and upon which the defendant’s duty has arisen, coupled with the facts which constitute the latter’s wrong, make up *the cause of action*’.

“A more extended definition is contained in *Frost v. Witter*, 1901, 132 Cal. 421, 64 P. 705, 707, 84 Mm. St. Rep. 53: ‘The action therefore springs from the obligation, and hence the “cause of action” is simply the obligation. This is in accordance with the view of Mr. Pomeroy, though expressed by him in new and somewhat awkward terms. *Pom. Pl. & Prac.* 453. The obligation thus constituting the cause of action may be either *ex contractu* or *ex delicto*; and, again, the latter may be either for compensation or damages, or for restitution, as e. g., the obligation of a wrongdoer to restore the property of another; for, though there is a distinction between actions brought for the recovery of damages or compensation and those brought for restitution, the former constituting actions in *rem* and the latter actions in *personam*, yet in either case the action is to enforce an obligation; nor can there be an action for any other purpose. 1 Am. Jur. 527. The “cause of action” is therefore to be distinguished

also from the “remedy”, which is simply the means by which the obligation or the corresponding action is effectuated; and also from the “relief” sought. *Pom. Pl. & Prac.* 453’. (Italics added.)

“Damage is not the cause of action. It is merely a part of the remedy which the law allows for the injury resulting from a breach of wrong. *Frost v. Witter*, *supra*; *Hurt v. Haering*, 1922, 190 Cal. 198, 211 P. 228, 229, *Bliss on Code Pleadings*, 1879, 113-117;

“*Phillips on Code Pleading*, 1896, 32, 33; *Clark on Code Pleading*, 1928, pp. 78-87; *Yankwich on California Pleading*, 1926, 82; 1 *Cor. Mur.*, p. 939; and cases cited in notes 20-26; 1 *C.J.S.*, *Actions*, 8(h) pp. 986, 987; *Foot v. Edwards*, 1855, 9 *Fed. Cas.* p. 358, No. 4, 908; *Box v. Chicago, Rock Island & Pacific R. R. Co.*, 1899, 107 *Iowa* 660, 78 *N.W.* 694, 698; and see *Silas A. Harris*, ‘What is a Cause of Action’, 1929, 16 *Cal. Law Rev.* 459.’”

“While a litigant may acquire a vested right to be compensated for loss immune from legislative encroachment by retroactive statute (*Pritchard v. Norton*, 1882, 106, *U.S.* 124, 132, *L. S. Ct.* 102, 27 *L. Ed.* 104, *Gibbs v. Zimmerman*, 1933, 290 *U.S.* 326, 332, 54 *St. Ct.* 140, 142, 78 *L. Ed.* 342), no vested right exists ‘in the measure of compensation’.”

We then approach the question of whether under the law of Alaska this statute is retroactive. Section 19-1-1, A.C.L.A. 1949.

“Sec. 19-1-1. Effect of repeals or amendments. The repeal or amendment of any statute shall not affect any offense committed or any act done or

right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture, or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the *ex post facto* and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment has not been made. (S.L.A. 1947, Chap. 18, 1, p. 60.)”

Let us now analyze this statute:

a. The repeal or amendment of any statute shall not affect offenses committed or any acts done or right accruing or accrued on any action or proceeding had or commenced prior to such appeal or amendment. This clearly states that no cause of action shall be affected by repeal or amendment. The statute then specifically continued “nor shall any penalty, forfeiture, or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute *save as limited by the ex post facto and other provisions of the Constitution*. This clearly means that unless a constitutionally protected right is interfered with by the amendment, that the action shall be prosecuted under the amendatory statute.

b. Therefore, if no constitutional structure can be erected upon the remedy and no constitutional right in

the remedy has been interfered with, then under the provisions of Section 19-1-1 the same should be prosecuted and continued and enforced under the amendatory statute.

Appellee argued at the trial of the case that the measure of fifty thousand dollars should be applied under the 1955 statute. The court applied the fifteen thousand dollar measure of damages. Appellee believes this was wrong but, since only eleven thousand five hundred dollars was obtained, appellee was in doubt as to whether the appellate court would consider that the appellee had been injured by the failure to apply the fifty thousand dollar amount. That question must later come before this court in other cases yet to be tried. But, since the appellant chose to appeal and other cases are yet to be tried involving these same questions, it is considered proper to fully brief the matter of the applicability of the new statute as well as the old statute of Alaska, as the same pertains to their effect upon the measure of damages in Alaska. Since it may not be possible for the attorney for appellee to be present at the oral argument of this case, every effort has been made to clearly outline appellee's position. The opinion of the trial court as to the measure of damages appears in the transcript of the record beginning at page 16.

Appellee believes that the trial court erred in its construction of Section 19-1-1 and in applying the rule cited in its opinion, transcript record page 16. The statutes involved were not identical or similar to the Alaska statute and ignored the distinction between

the right of action, the cause of action, the claim and the remedy as distinguished in *United States v. Standard Oil*, 21 F. Supp. 645, District Court S.D., California, N.D., Dec. 4, 1937.

ARGUMENT II.

The trial court applied the correct measure of damages in its Instruction No. 15.

Hansen v. Hayes, 154 P. 2d 202, states the rule under the Oregon statute, O.C.L.A. Section 8-903, where there are named beneficiaries surviving, the damages are measured by "the pecuniary benefits which those beneficiaries might reasonably be expected to have derived from the deceased had his life not been terminated; and where no named beneficiaries survive, the damages would be measured by the 'benefit of the estate' rule". That rule is applicable to the Alaska statute.

WRONGFUL DEATH STATUTES.

"There is a distinction in the nature and measure of damages to the injured person, or a right given to the surviving spouse or dependents, or a statutory right for the benefit of the estate." *The Princess Sophia*, 35 F. 2d 736, 738.

To the injured person:

Survival statutes have the nature of allowing recovery by the personal representative of the deceased in the same manner and form as if the deceased, him-

self, had brought the action. The measure of damages is consistent with the nature including pain, suffering, etc.

A right given to the surviving spouse or dependent:
Lord Campbell's Act, 1846 (9 and 10 Vict. C. 93).

This statute was enacted substantially by New York in 1847, and by Illinois in 1853, the latter providing:

“Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: provided, that every such action shall be commenced within two years after the death of such a person.” (*Wilcox v. Bierd et al.*, 162 N.E. at page 174, Sec. 2.)

Versions of Lord Campbell's Act have the nature of allowing recovery by the personal representatives of the deceased for the exclusive benefit of named survivors. The measure of damages is consistent with the nature by fairly and justly compensating the named beneficiaries for the pecuniary injuries to them

by the death. A statutory right for the benefit of the estate:

Loss to estate statutes take the general form of the Oregon statute prior to its admendment in 1939:

“Death from Injury, When Representatives may Sue for; Limitations. When the death of a person is caused by the wrongful act or omission of another the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$7,500, and the amount recovered, if any shall be administered as other personal property of the deceased person. (L. 1862; D. Sec. 367; H. Sec. 371; B & C Sec. 381; L. 1907, C. 72.)” (Section 380, O.C., 1920.)

They have the nature of allowing recovery by the personal representatives of the deceased for the loss sustained by the estate. The measure of damages is consistent with the nature by compensating the estate for what the deceased would likely have provided for an estate had he lived a life expectancy. See *Parham v. Portland Electric Co.*, 33 Ore. 451, 53 P. 14, 24, 40 L.R.A. 799, 72 Am. St. Rep. 730; *Carlson v. Ore. Short Line & U.N. Ry. Co.*, 21 Ore. 450, 28 P. 497, 499.

ALASKA WRONGFUL DEATH STATUTE.

Much has been said about the intentions of Congress in 1900 in providing Section 353, Alaska Code of Civil Procedure; even more has been said and relied upon concerning the substantial identity of the wrongful death statutes of Alaska and Oregon, the binding authority of Oregon decisions, and legislative ratification of all. The cumulative result is confusion and loss of the rightful distinction in the nature and measure of damages under the Alaska Wrongful Death Statute.

As part of the Act of June 6, 1900, 31 Stat. 392, now appearing as Section 61-7-3, A.C.L.A. 1949, amended by Chapter 89, S.L.A. 1949, the action for wrongful death provides:

“Action for wrongful death: Disposition of amount recovered. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed fifteen thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedents husband or wife and children when he or she leaves a husband, wife, or children, him or her surviving; and when any sum is collected it must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of ad-

ministration, and when he or she leaves no husband, wife or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person; but the plaintiff may deduct therefrom the expenses of the action, to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper. Approved March 23, 1949.”

Application of the distinction in the nature of damages to the Alaska Statute reveals (1) recovery by the personal representatives of the deceased for the exclusive benefit of decedent’s husband or wife and children, and (2) recovery by the personal representatives of the deceased of an amount to be administered as other personal property when he or she leaves no husband, wife or children him or her surviving. This distinction in the nature of damages carries with it the measure of damages consistent with the nature; namely (1) fair and just compensation of the named survivors for the pecuniary injuries to them by the death, and (2) compensation to the estate for what the deceased would likely have provided for an estate had he lived the life expectancy.

Part of this statute was construed by the Court of Appeals of this Circuit in *Jennings v. Alaska Treadwell Gold Mining Co.* (C.C.A. 9th, 1909), 3 Alaska Fed. 350, 170 Fed. 146.

In this case Judge Morrow said “The Alaska Code of Civil Procedure is substantially the same as the Oregon Code” which is perhaps as far as some counsel

have read, for the confusion in Alaska today as to the interpretation of the Alaska Wrongful Death Statute would be non-existent had a thorough reading and understanding of Judge Morrow's decision been undertaken.

The single question of the nature and measure of damages was under consideration. Judge Morrow compared the Oregon and Alaska statutes; he noted the provision in the Alaska Code for the exclusive benefit of named survivors, but he said ". . . that provision has no bearing on this case as the deceased left no surviving wife or children." The Judge went on in his analysis of the Alaska statute to determine what happened when there was a wrongful death action for a single man and the statute said, "The amount recovered shall be administered as other personal property of the deceased person." Judge Morrow said "This last provision, it will be observed, is identical with the Oregon Code." He thereupon and only in the consideration of damages in the death of a man leaving no wife or children examined the decision of the Supreme Court of Oregon in the case of *Parham v. Portland Electric Co.*, 33 Ore., 451, 53 Pac. 14, 24, 40 L.R.A. 799, 72 Am. St. Rep. 730.

Judge Morrow reasoned,

"It is true that the two statutes are not identical as a whole, but the change in the Alaska Code from the Oregon Code makes more definite and certain the purpose of Congress to adopt the construction of the Supreme Court of Oregon for estates, WHERE THE DECEDENT LEFT NO HUSBAND WIFE OR CHILDREN."

Judge Morrow in effect said that the Alaska Code relating to wrongful death presents dual natures and measures of damages; that he was concerned with only one nature and measure, as the decedent left no wife or children; that since the *part* of the Alaska Statute he was concerned with was the *whole* of the Oregon statute, he would follow the Oregon interpretation. He then applied this reasoning to the case before him and gave the opinion that under the Alaska statute when the decedent left no husband, wife or children, the nature of damages would be loss to the estate, and the measure of damages consistent with the nature would be "earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life."

For a number of years following the *Jennings v. Treadwell* (supra) decision, it appears that the Alaska actions for wrongful death were actions in which no husband, wife or children survived the decedent; the nature of the damages sought being "loss to the estate" and the measure of damages consistent with the nature what the deceased would have provided for an estate. The Oregon decisions were applicable and were correctly followed. *Caswell v. Copper River and N. W. Ry.*, 4 Alaska 709 (1913); *Koske v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334.

In 1939 the original Oregon law was revised and now appears in 1 Oregon Compiled Laws, Section 8-903, as follows:

"When the death of a person is caused by the wrongful act or omission of another, the personal

representatives of the former for the benefit of the widow or widower, or surviving dependents, and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased, may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$10,000."

Only at this point did the Oregon and Alaska statutes become substantially identical throughout in that both provided (1) a version of Lord Campbell's Act, and (2) a benefit of estate action.

In 1943 in the case of *Kreidler v. Ketchikan Spruce Mills*, 10 Alaska 365, four children survived the deceased. Judge Alexander in quoting from Section 3845, C.L.A. 1933, under which the action was brought said "and it also provides: 'and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children, him or her surviving; and when any sum is collected it must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration'." The District Judge continues, "This section of our statute was taken from the Oregon Code, and the measure of damages laid down by the Oregon Supreme Court in the early case of *Carlson v. Ore. S. L. & U.N. Ry. Co.*, 21 Ore. 450, 28 P. 497, is still followed.

In actions brought under this section, the true measure of damages, as stated in that case, "is the pecuniary loss suffered by the estate, without any solatium for the grief and anguish of surviving relatives or pain and suffering of the deceased; and that loss would be what the deceased would have probably earned, etc."

Judge Alexander erred in saying the quoted section of the Alaska Statute was taken from the Oregon Code, as that particular provision for the benefit of the named survivors antedated the similar Oregon provision by 39 years. Following this false premise the old decision of the Oregon Supreme Court was relied on and a measure of damages inconsistent with the nature of the action was applied.

In *Dralle v. Steele*, 1952, 13 Alaska 680, Judge Dimond, in ruling on motions in a wrongful death action in which a widow and child survived, recognized the confusion in previous cases. He said,

"It is too plain for argument that Congress in passing the Act of June 6, 1900, did not adopt the Oregon statute on this subject but instead reverted more nearly to the text of the original Lord Campbell's Act, still retaining however, that part of the Oregon statute which provides for a recovery by the estate in the event the decedent left no husband, wife or children . . . It is therefore obvious that any decision based upon the Oregon law, as it existed on June 6, 1900, can be of little use in construing the Alaska Act in any case where there is a surviving husband, wife or children, and is likely to be completely misleading.

In any case where there is no surviving husband, wife or children, then the Alaska Statute may be and has been construed to the same effect as the Oregon law. *Jennings v. Alaska Treadwell*, supra, *Kreidler v. Ketchikan Spruce Mills* (incorrectly cited in support of this point), *Linge's Administrator v. Alaska Treadwell Co.*, 1906, 3 Alaska 9. But the authority of the Oregon decision ends there."

Judge Dimond turned to the "views of the highest court of some state (New York) which has a statute substantially similar to that of Alaska." *Hamilton v. Erie R. Co.* (1916), 219 N.Y. 343, 114 N.E. 399, 402, and *Meekin v. Brooklyn Heights Ry. Co.* (1900), 164 N.Y. 145, 58 N.E. 50, 51 L.R.A. 235. After establishing the nature of damages to the benefit of the surviving widow and children he examined the measure of damages and concluded that "recovery must be limited to pecuniary damages suffered by the wife and children . . ." (p. 688.)

According to Appellant's Appendix No. B, Judge Dimond, in this same case, issued to the jury Instruction No. 8, in which he said "The true measure of damages is the pecuniary loss suffered by the estate". Truly a paradox, but consistent with the inconsistencies which Judge Dimond himself sought to eliminate.

The Princess Sophia (C.C.A. 9th, 1932), 61 F. 2d 339, 35 F. 2d 736, does not support appellant's position. The District Court, W. D. Washington, N. D., in adjudging under the Alaska statute the sufficiency of more than 200 claims (the Commissioner having

allowed each claimant the \$10,000 limit, and the petitioner having excepted to each allowance), said at p. 738 "There is a distinction in the nature and measure of damages to the injured person, or a right given to the surviving spouse or dependents, or a statutory right for the benefit of the estate. In the first would be included pain, suffering, etc.; . . . In the second, loss to the beneficiary, which would include loss to the named person by way of contribution, support, including elements which may not be approximated in money, such as love and affection, aside from the financial loss; third, to the estate, where it is made as nearly as may be to the financial returns which could reasonably be expected, what investments or savings have been effected during the lifetime, the reasonable expectancy or certainty of continued savings, and giving consideration to his age, health, habits, disposition, and capacity to labor and to save, what would he likely have provided for an estate had he lived the life expectancy". The foregoing is the rule of recovery applied by Judge Neterer to the evidence to sustain and deny the exceptions as to the claimants. To the claims for named beneficiaries the court was not warranted "in finding a pecuniary loss where none is shown by the evidence", and as to the claims for the benefit of the estate the court required "some evidence of accumulation and saving habit," there being "no conflict of evidence, but failure of evidence."

The Circuit Court of Appeals, Ninth Circuit, reviewed and affirmed all of the District Court's findings except

“The one assignment of error not passed upon is the one relating to the holding and finding of the court that the evidence was not sufficient to sustain the Commissioner’s findings, and award of damages in favor of a hundred or more claimants . . . Apparently after payment of court costs and other costs on appeal, nothing will be left to be distributed among the claimants . . . and we think it needless.”

Appellee concludes that in the instant case the correct measure of damages has been applied.

Dated, Fairbanks, Alaska,

October 15, 1956.

Respectfully submitted,

ROBERT A. PARRISH,

Attorney for Appellee.

No. 15,149

United States Court of Appeals
For the Ninth Circuit

WIEN ALASKA AIRLINES, INC.,
Appellant,
vs.

SAMUEL SIMMONDS, Administrator of
the Estate of Martha Simmonds,
Deceased, for the benefit of Samuel
Simmonds, and the children of the
Deceased, namely, Leona Simmonds,
Nellie Simmonds, Doreen Simmonds,
Eli Simmonds, Margaret Simmonds
and Arnold Simmonds,
Appellee.

APPELLANT'S REPLY BRIEF.

CHARLES J. CLASBY,
1000 Polaris Building, Fairbanks, Alaska,
Attorney for Appellant.

COLLINS, CLASBY & SCZUDLO,
1000 Polaris Building, Fairbanks, Alaska,
Of Counsel.

FILED

NOV 1956

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
I. The 1955 wrongful death act	2
II. The 1949 wrongful death act	4
Conclusion	5

Table of Authorities Cited

Cases	Pages
Field v. Witt Tire Co. of Atlanta, Ga. (2d Cir. 1952), 200 Fed. 74	3
Keeley v. Great Northern Ry. Co. (Wisc. 1909), 121 N.W. 167	3
Theodosis v. Keeshin Motor Express Company, Inc. (Ill. 1950), 92 N.E. 2d 794	3
United States v. Standard Oil Company of California (S.D. Cal. N.D. 1937), 21 F. Supp. 645; aff'd (9th Cir. 1940), 107 F. 2d 402	3

Statutes

Session Laws of Alaska 1955, Alaska Wrongful Death Act, c. 153	1, 2
Alaska Compiled Laws Annotated 1949:	
Section 14, Organic Act 4-3-3	2
Section 19-1-1	2
Section 61-7-3, Wrongful Death Act	1

Texts

77 A.L.R. 1338, Annotation	3
----------------------------------	---

**United States Court of Appeals
For the Ninth Circuit**

WIEN ALASKA AIRLINES, INC.,
Appellant,

vs.

SAMUEL SIMMONDS, Administrator of
the Estate of Martha Simmonds,
Deceased, for the benefit of Samuel
Simmonds, and the children of the
Deceased, namely, Leona Simmonds,
Nellie Simmonds, Doreen Simmonds,
Eli Simmonds, Margaret Simmonds
and Arnold Simmonds,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee in his brief argues that the applicable measure of damages in this case is that set forth in the 1955 Alaska Wrongful Death Act, ch. 153 S.L.A. 1955; and that even if the 1955 Act is not controlling, the trial Court nevertheless applied the proper measure of damages under the 1949 Wrongful Death Act, section 61-7-3, ACLA 1949. Neither of these arguments is tenable.

I.

THE 1955 WRONGFUL DEATH ACT.

The 1955 Alaska Wrongful Death Act, c. 153, S.L.A. 1955, is not applicable to this case because of the provisions of Section 19-1-1, ACLA 1949. This section, a common type of savings statute, reads as follows:

“The . . . amendment of any statute shall not affect . . . any act done or right accruing or accrued or any action or any proceeding had or commenced prior to . . . such amendment; . . .”

And that is this case. The accident occurred October 10, 1951. This action was commenced May 21, 1953. [The action would be barred by limitations October 10, 1953]. The Act was amended *effective* June 28, 1955, [Approved March 28, 1955, and effective 90 days thereafter; Sect. 14, Organic Act 4-3-3, ACLA 1949].

The amendment came not only after an action was commenced, but after the date when the cause would otherwise have been barred by the statute of limitations. The foregoing statute is clear in its language; and applied to the facts of this case, it does, without question, bar consideration of the amendment as applicable to this action.

Following the semi-colon which ends the above quotation from Section 19-1-1, the statute deals with the release or extinguishment of a penalty, forfeiture or liability. This case involves neither the release nor the extinguishment of a penalty, forfeiture or liability and therefore this part of the savings statute is not pertinent.

Appellee relies on *United States v. Standard Oil Company of California* (S.D. Cal. N.D. 1937), 21 F. Supp. 645; aff'd (9th cir. 1940), 107 F. 2d 402. This case says that since at common law interest as an element of damage in a conversion action was discretionary with the Court, therefore a statute fixing interest from the date of conversion conferred no vested right that could not be subsequently abrogated by a statute retroactive by its terms.

At common law the right of action for injury abated upon the death of the person injured. Accordingly the right created by the statutes is to damages, and the indemnity is limited to the statutory limitation. The situation presents no comparison with that in the *Standard Oil* case (*supra*).

The situation in this case is not new. Often legislatures have raised the limits of the recovery under wrongful death acts; and the Courts have consistently refused to apply the new sum as the measure in either pending cases, or causes arising prior to the amendment.

Field v. Witt Tire Co. of Atlanta, Ga. (2d Cir. 1952), 200 Fed. 74;

Theodosia v. Keeshin Motor Express Company, Inc. (Ill. 1950), 92 N.E. 2d 794;

Keeley v. Great Northern Ry. Co. (Wisc. 1909), 121 N.W. 167 at 170.

See also Annotation: 77 A.L.R. 1338.

II.

THE 1949 WRONGFUL DEATH ACT.

Counsel for appellee criticizes the soundness of the reasoning of the Court in the *Kriedler* case (10 Alaska 365). Nonetheless that decision stands; and functioned as a judicial guide-post to the 1949 Legislature in re-enacting our Wrongful Death Act. And counsel finds Judge Dimond's instructions in the *Draille* case [Appendix B, Appellant's Brief] "Truly a paradox . . .",

However, the real paradox is the decision of the trial Court in this case, occurring at the end of nearly 55 years of settled understanding of the Act, after the reaffirmation of that understanding through the 1949 re-enactment, and acting as a preamble to legislative adoption, in 1955, of a completely different concept in the Wrongful Death Act from that then existing.

The Oregon legislature manifestly changed its Act in 1939. The Courts of Oregon could do nothing other than give significance to the intent implicit in the change. But Oregon legislative intent as found by its Courts is not binding on Alaska, and cannot be said to overrule the interpretations of the Alaska Act by the Alaska Courts, and this Circuit Court. Appellee has shown no affirmative authority supporting his interpretation of the 1949 Act.

CONCLUSION.

The position of appellant, and the authorities noted in appellant's brief, not having been effectively challenged by appellee, a reversal by this Court of the District Court's judgment should be ordered.

Respectfully submitted,

CHARLES J. CLASBY,

Attorney for Appellant.

COLLINS, CLASBY & SCZUDLO,

Of Counsel.

Service acknowledged by receipt of a copy this 29th day of October, 1956.

Robert A. Parrish,

Attorney for Appellee.



